No. 01-682-CFX Title: Kay Barnes, etc., et al., Petitioners
v.
Jeffrey Gorman

Docketed: November 8, 2001 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Nov 8 2001	Petition for writ of certiorari filed. (Response due December 20, 2001)
	Nov 30 2001	Order extending time to file response to petition until December 20, 2001.
	Dec 18 2001	Brief of respondent Jeffrey Gorman in opposition filed.
	Dec 20 2001	Brief amici curiae of City of Sacramento, et al. filed.
	Dec 26 2001	DISTRIBUTED for Conference of January 11, 2002
	Dec 27 2001	Reply brief of petitioners Kay Barnes, etc., et al. filed.
	Jan 11 2002	Petition GRANTED. Petitioners' brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 25, 2002. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 27, 2002. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 15, 2002. Rule 29.2 is suspended in this case. SET FOR ARGUMENT April 23, 2002. **********
	Feb 21 2002	Order extending time to file the joint appendix and petitioners' brief on the merits, as per the same conditions of the order granting certiorari on January 11, 2002, to and including 3 p.m., Wednesday, February 27, 2002.
	Feb 25 2002	Joint appendix filed.
	Feb 26 2002	Brief amici curiae of CA Municipalities, State Municipalities, FL League of Cities filed.
	Feb 26 2002	Brief amicus curiae of States of Hawaii, et al. filed.
	Feb 26 2002	Brief amicus curiae of International City/County Management Association filed.
	Feb 27 2002	Brief of petitioners Kay Barnes, etc., et al. filed.
	Feb 27 2002	Brief amicus curiae of United States filed.
	Mar 5 2002	Record filed.
	Mar 8 2002	CIRCULATED.
	Mar 8 2002	Record filed.
	Mar 12 2002	Order extending time to file respondent's brief on the merits. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 29, 2002. Rule 29.2 is suspended.
	Mar 21 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 29 2002	Brief of respondent Jeffrey Gorman filed.
	Mar 29 2002	Brief amicus curiae of Association of Trial Lawyers of America and AARP filed.
	Apr 1 2002	Motion of the Solicitor General for leave to participate

No. 01-682-CFX

Entry	Date	Proceedings and Orders
		in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 15 2002	Reply brief of petitioners Kay Barnes, etc., et al. filed.
	Apr 23 2002	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), prohibits disability-based discrimination in any public program or activity receiving federal funds. Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132, more generally prohibits disability-based discrimination in any public program, activity or service regardless of the receipt of federal funds. The question presented in this case is:

Whether the Eighth Circuit, in agreement with the Fourth Circuit but in conflict with the Third and Sixth Circuits, correctly held that punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioner Kay Barnes states that the other parties in the court of appeals were the following defendants named in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri: Dr. Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckhold. Although the Eighth Circuit's caption also lists as defendants Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri Police Department, and Neil Becker, in his official capacity as a member of the Kansas City Police Department, both were in fact dismissed from the case by the trial court prior to the entry of judgment. See note 4, *infra*. In this Court, the petitioners in addition to Commissioner Barnes are Commissioner Daniels-Young, Commissioner Eckhold, and Commissioner Karl Zobrist (who has succeeded to the office previously held by Jeffrey J. Simon, see S. Ct. Rule 35.3), all in their official capacities. Commissioner Mulvihill resigned from the Board of Police Commissioners effective on May 26, 2001; his successor has not yet been named, but will become a petitioner once he or she takes office. S. Ct. Rule 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 257 F.3d 738. The order denying rehearing en banc (Bowman and Loken, JJ., dissenting) and panel rehearing (App., *infra*, 52a) is unreported. A previous opinion of the court of appeals (*id.* at 35a-51a) is reported at 152 F.3d 907. The opinion of the district court vacating the punitive damages award (App., *infra*, 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2001, and rehearing was denied on August 20, 2001 (App., *infra*, 52a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972, all as amended, are set forth at App., *infra*, 53a-56a.

STATEMENT

This long-running case arises out of the 1992 arrest of a patron of a Kansas City nightclub who got into an altercation with a bar employee, was forcibly ejected from the bar, and then, once outside the bar, refused to honor a request to leave made by several off-duty police officers serving as security guards. After being placed under arrest for trespassing, the patron, who is paraplegic and confined to a wheelchair, was transported to the police station in a van that was equipped with a bench. Despite precautions taken to secure the patron in an upright position, he fell from the bench during the trip after he loosened his seatbelt and another belt that had been used to secure him somehow came undone. On the basis of injuries allegedly sustained in the fall, the patron – respondent Jeffrey

Gorman – sued several members of the Kansas City police department and Board of Police Commissioners, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The jury awarded Gorman more than a $1 million in compensatory damages as well as punitive damages of $1.2 million. Although the district court vacated the $1.2 million penalty as legally impermissible, the court of appeals reversed. In holding that punitive damages could be recovered from a municipal government under these provisions of the federal civil rights laws, the Eighth Circuit placed itself squarely in conflict with decisions of the Third and Sixth Circuits. Tellingly, the Eighth Circuit acknowledged that it was "sympathetic" to the Sixth Circuit's contrary view (which rested on concerns that were "hardly misplaced") and had reached the opposite conclusion "not with great satisfaction." App., *infra*, 12a, 13a, 15a. Nevertheless, the Eighth Circuit deemed itself "compel[led]" by this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), to "part[] ways with our sister circuit" and to recognize an implied judicial remedy of punitive damages. App., *infra*, 13a, 15a-16a.

A. The Statutory Framework and This Court's Decision in *Franklin*

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of vocational and other rehabilitation services for the disabled and imposes certain conditions on the recipients of federal funds. Among other things, the Act (in § 504) bars discrimination against persons with disabilities under federal grants and programs and (in § 501) places certain obligations on federal agencies with respect to the employment of the disabled. See 29 U.S.C. §§ 791, 794(a). Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

In 1978, Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub. L. No. 95-602, Title I, § 120(a), 92 Stat. 2982. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2). Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"), prohibits discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance."

In 1986, in response to *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), Congress abrogated the States' Eleventh Amendment immunity with respect to suits based on violations of Section 504 of the Rehabilitation Act, Title VI, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX"), which prohibits sex discrimination in educational activities and programs that receive federal funding. See 42 U.S.C. § 2000d-7(a)(1).

In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, which overturned *Grove City College* v. *Bell*, 465 U.S. 555 (1984), by defining "program or activity" in Title VI, Section 504 of the Rehabilitation Act, and related statutes to include "all of the operations" of an entity, "any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a.

In 1990, Congress passed the Americans with Disabilities Act ("ADA"). Section 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42

U.S.C. § 12132. Section 203 of the ADA, in turn, specifies that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

In enacting Title VI, Title IX, Section 504 of the Rehabilitation Act, and Section 202 of the ADA, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979)), and Title VI (*Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983)).

Following enactment of the ADA, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072, which, among other things, created a limited right to recover punitive damages (subject to specified monetary caps) in certain actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of ADA, 42 U.S.C. § 12112. See 42 U.S.C. § 1981a(a)(2). The punitive damages provision does not apply to Section 504 of the Rehabilitation Act or to Section 202 of the ADA. The 1991 Act also provides that the newly authorized punitive damages remedy may not be recovered from any "government, government agency or political subdivision." *Id.* § 1981a(b)(1).

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that an implied right of action under Title IX supports a claim for "monetary damages." *Id.* at 63. The Court reaffirmed the "general rule" that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any *appropriate* relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-71 (emphasis added). Based on its review, the Court found no evidence that Congress had intended to depart from this presumption. *Id.* at 72-73. Finally, the Court examined but

rejected several other arguments why an award of compensatory damages would be inappropriate. *Id.* at 73-76.

B. The Events Underlying This Lawsuit

Respondent Jeffrey Gorman was rendered paraplegic by an auto accident that occurred in 1988. On a Saturday night in May 1992, Gorman and a friend were out drinking at a country-and-western nightclub in Kansas City, Missouri, when they got into an altercation with a bouncer.[1] As a result, Gorman was forcibly expelled from the bar. Outside, he approached several police officers in the hope that they would intercede on his behalf. The officers, who were off duty and working as private security, instead told Gorman that he had to leave. When Gorman refused, he was placed under arrest for trespass. Gorman was subsequently convicted of one count of misdemeanor trespass.

While waiting for a police van that would transport him to the station for booking, Gorman told the off-duty officers that he had to go to the restroom to empty his full urine bag.[2] The off-duty officers (whom Gorman sued in a separate lawsuit, which was settled) told Gorman to wait until he got to the station. Sometime thereafter, a police van arrived driven by Officer Neil Becker. The van was equipped with a bench but lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Gorman testified at trial that he told

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[1] As the court appeals correctly noted, "[a]lmost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent." App., *infra*, 3a n.2. Like the court of appeals, we present here Gorman's version of events because he prevailed below. *Ibid.*

[2] "Gorman * * * lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist * * *." App., *infra*, 2a.

the officers that he was unable to stay upright without his wheelchair and could not ride in the van without risking a fall from the bench. Nevertheless, the officers placed Gorman on the bench and used a seatbelt to strap him in. The seatbelt did not properly hold Gorman upright, and it lay across his already full urine bag. According to Gorman's testimony, the officers loosened the seatbelt after he complained about it. As an extra precaution, however, the officers also used Gorman's own belt to strap him to the wire mesh behind the bench to secure him in an upright position.

Officer Becker, the only on-duty officer, then drove the van to the police station. As some point during the ride, Gorman released his seatbelt out of concern over the pressure it was placing on the urine bag. Eventually, the other belt also came undone and Gorman fell to the floor, causing the urine bag to rupture. Officer Becker stopped the van but was unable to lift Gorman by himself, so he fastened Gorman to a support in the back of the van for the duration of the trip. After arriving at the station, Gorman was booked, processed, and released.

C. The Proceedings Below

1. On May 30, 1995, Gorman filed an action in the United States District Court for the Western District of Missouri alleging that, "by reason of" his disability, he had been discriminated against and had been "excluded from participation in" or "denied the benefits of" the "programs" or "activities" of the Kansas City Police Department, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the ADA, 42 U.S.C. § 12132. Gorman named as defendants Officer Becker, then-Chief of Police Steven Bishop, and various current or former members of the Board of Police Commissioners of Kansas City ("the Board"), including the Mayor of Kansas City, Missouri (who by virtue of that position automatically serves as a Member of the Board).[3]

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[3] The Board members named in the original complaint were Mayor Emanuel Cleaver II, John Dillingham, Jack Headley, Jacqueline Paul, Balius Tate, Donna Boley, and Albert Riederer. Resp. C.A. App. 25. In an amended complaint filed on November 6, 1995, respondent added defendants Stacey Daniels[-Young] and James F. Ralls, Jr., and omitted defendant Riederer. Resp. C.A. App. 29; see also Pet. ii; note 4, *infra*.

Following an initial dismissal by the district court (see *Gorman* v. *Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996); *Gorman* v. *Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996)), the court of appeals remanded the case for a trial of respondent's claims against petitioners in their official capacity. App., *infra*, 35a-51a. A jury thereafter returned a verdict in respondent's favor, awarding him compensatory damages of $1,034,817.33 and punitive damages of $1,200,000.00. *Id.* at 4a.[4]

2. Relying (App., *infra*, 24a-27a) on the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996), the district court set aside the award of punitive damages. App., *infra*, 21a-34a. The court explained that its "first task," under the framework articulated in this Court's *Franklin* decision, was "to determine whether there is a clear indication that Congress imposed limits on the scope of relief." App., *infra*, 25a. The court found such a clear indication in the three amendments made to Section 504 of the Rehabilitation Act in 1986, 1987, and 1991, as well in the "backdrop of judicial decisions" that existed at the time these amendments occurred. *Id.* at 25a-26a. Although "Congress amended portions of the Rehabilitation Act three times (including section

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[4] At the close of Gorman's case, the trial court dismissed the claims against Police Chief Easley and Officer Becker in their official capacities, thus leaving only the individual Board members as defendants. See 4/5/99 Tr. 495-496; Resp. C.A. App. 45 (jury instruction explaining dismissal). The district court's judgment was entered against Mayor Cleaver and Commissioners Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckhold, all in their official capacities as members of the Board. While this case was on appeal, petitioner Kay Barnes succeeded Emanuel Cleaver II as Mayor of Kansas City and thus as a member of the Board.

504 twice) and the ADA once, * * * at no time did Congress take steps to alter the consensus of judicial decisions" holding that punitive damages "were not available." *Id.* at 25a-27a. "'The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in status quo – *i.e.*, no punitive damages.'" *Id.* at 27a (quoting *Moreno*, 99 F.3d at 791).

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-20a. Although the panel stated that it was "sympathetic" to the Sixth Circuit's view that punitive damages are unavailable under Section 504 (*id.* at 8a, 12a), and even acknowledged that the "concerns" animating the Sixth Circuit were "hardly misplaced" (*id.* at 13a), it nevertheless ruled ("not with great satisfaction") that the Sixth Circuit's approach was "foreclosed by controlling precedent" (*id.* at 8a, 15a) – in particular, this Court's decision in *Franklin*.

As the Eighth Circuit read *Franklin*, there is a presumption that all "appropriate remedies" will be available in an implied cause of action, which can be overcome only if Congress "expressly limit[s] the remedies available." App., *infra*, 11a-12a. In the court of appeals' view, because this Court had "long made clear that punitive damages are an integral part of the common law tradition and the judicial arsenal," punitive damages "fall within the panoply of remedies *usually available* to American courts." *Id.* at 10a (emphasis added) (citing *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)). "Given an implied cause of action," the Eighth Circuit reasoned, *Franklin* "compels the conclusion" that a plaintiff may recover "all appropriate remedies, including punitive damages" – unless there is an "express congressional statement to the contrary." *Ibid.*

Unlike the Sixth Circuit – whose "methodology and conclusions" the court below explicitly rejected (App., *infra*, 12a) – the Eighth Circuit could not discern the requisite congressional intent to foreclose a punitive damages remedy. The court recognized that its analysis "turns * * * on its head"

Congress's understanding, evident in the "text and history of the 1991 Act" (which added a limited punitive damages remedy), that in so doing Congress "intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA, and "considered the new language necessary to create a punitive damages remedy under the acts." *Id.* at 15a. But that evidence was not sufficiently "express" to persuade the court of appeals that Congress intended to preclude resort to punitive damages as a remedy in cases not covered by the narrow 1991 provision.

The court of appeals then remanded the case for a determination (purportedly under *Franklin*) whether an award of punitive damages was "appropriate" in this "specific case." App., *infra*, 16a. Again, the panel flatly disagreed with the Sixth Circuit. As a *categorical* matter, that court had held that, "given the legislative and judicial backdrop" and a number of policy considerations, punitive damages are "not 'appropriate' as required by *Franklin*" in *any* action brought under Section 504 of the Rehabilitation Act. *Id.* at 16 n.10 (citing *Moreno*, 99 F.3d at 791-92). In the Eighth Circuit's view, the question whether a remedy is "appropriate" under *Franklin* is a case-specific (not statute-specific) inquiry. App., *infra*, 16a & n.10. The court therefore remanded for consideration of whether the punitive award in this case was supported by sufficient evidence and not constitutionally excessive.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve an important question of federal law on which the circuits are sharply divided: whether punitive damages are an appropriate implied remedy in private disability discrimination lawsuits brought against municipal governments (and perhaps other defendants) under Section 504 of the Rehabilitation Act and Section 202 of the ADA. Because those provisions apply to a wide array of public "programs," "activities," and (in the case of the ADA) "services," see *Pennsylvania Dep't of*

Corrections v. *Yeskey*, 524 U.S. 206 (1998), the question presented in this case has arisen with great frequency.

Much of the confusion in the lower courts boils down to disagreements over the meaning of *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which only this Court can clarify. Perhaps for that reason, and because it felt "compel[led]" by its reading of *Franklin* (App, *infra*, 13a) to reach a result it regarded as questionable (*id.* at 8a, 12a), the Eighth Circuit all but invited this Court to review its decision. See *id.* at 15a-16a ("Perhaps our parting ways with our sister circuit will prompt the Supreme Court or Congress to inject additional clarity into this area."). The Court should accept that invitation, correct the serious errors made by the Eighth Circuit, and ensure that *Franklin* is not used as a vehicle for working future incursions into the traditional immunity of municipalities from punitive liability, see *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981).

A. THE EIGHTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED CIRCUIT CONFLICT

In holding that punitive damages were recoverable, the Eighth Circuit expressly disagreed with the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996). Although the Eighth Circuit believed that "only one other circuit" besides itself "has addressed" this issue (App., *infra*, 8a), in fact the conflict is much deeper. As we explain below, two additional circuits – and scores of district courts – have taken conflicting positions on the availability of punitive damages in disability discrimination lawsuits brought against government defendants under Section 504 of the Rehabilitation Act and Section 202 of the ADA. To resolve the mature conflict in the circuits on the question of punitive damages, and to clarify the meaning of *Franklin*, further review is warranted.

1. In *Moreno*, the Sixth Circuit squarely held that punitive damages are not an appropriate remedy in an implied cause of action under Section 504. The en banc majority conducted an

extensive review of the amendments made to the Rehabilitation Act between 1986 and 1991 as well as "the background against which Congress was legislating." 99 F.3d at 789. At the time these amendments were made, the Sixth Circuit explained, "punitive damages had never been awarded under § 504 and were widely believed to be unavailable under that section" as well as "under Title VI." *Id.* at 790-91 (citing cases). "In fact, it is not until 1994 that we find a single case where punitive damages were awarded under § 504." *Id.* at 790. Moreover, in neither the 1986 nor 1987 amendments (see page 3, *supra*) "did Congress indicate any desire to change the established understanding that punitive damages were not available." *Ibid.* Finally, the Civil Rights Act of 1991, which "made punitive damages available – for the first time – under § 501 of the Rehabilitation Act," pointedly failed to "extend the new punitive damages provision to § 504." *Ibid.* "The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in *statu quo* – *i.e.*, no punitive damages." *Id.* at 791.

The Sixth Circuit also concluded (99 F.3d at 791) that "punitive damages are not 'appropriate' under § 504 in any event" – as that court understood the word "appropriate" in *Franklin*. "It would be highly anomalous" the court explained, "to let a plaintiff asserting an implied right of action under § 504 recover more in punitive damages than could be recovered by a plaintiff asserting the statutory remedy created for § 501." *Ibid.* Moreover, the court noted, "Congress has chosen other ways to 'punish' those who violate § 504" (99 F.3d at 791), in particular the termination of funding through administrative procedures. Finally, "judicial creation of a punitive damages remedy" would have the effect of "expand[ing] § 504 beyond all 'manageable bounds'" (*id.* at 792 (quoting *Alexander* v. *Choate*, 469 U.S. 287, 299 (1985))), thereby "upset[ting] a long-standing balance that the courts, absent some contrary directive by Congress, should be vigilant to preserve." *Ibid.*

The Eighth Circuit in this case sharply disagreed with both the result in *Moreno* and what it termed the Sixth Circuit's "methodology." App., *infra*, 12a. In so doing, the court below essentially cast its lot with the two members of the Sixth Circuit who dissented from the 11-2 en banc opinion. See *Moreno*, 99 F.3d at 793-96 (opinions of Judges Martin and Daughtrey, concurring in part and dissenting in part).

2. Contrary to the Eighth Circuit's suggestion, the Sixth Circuit is not the only court of appeals to have resolved the issue presented in this case. The Fourth Circuit has also held – albeit somewhat obliquely – that punitive damages may be recovered in an action brought under Section 504 of the Rehabilitation Act. In *Pandazides* v. *Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994), the court was faced with the question whether a plaintiff suing under Section 504 is entitled to a jury trial under the Seventh Amendment. To resolve that issue, the Fourth Circuit examined "whether the remedy available is * * * legal or equitable in nature." 13 F.3d at 828-29. In considering "the character of the damages available under § 504," the Fourth Circuit observed that the "lower courts are split over the availability of * * * punitive damages" in this setting. *Id.* at 829-30. It went on to rule that its prior decision in *Eastman* v. *Virginia Polytechnic Inst. & State University*, 939 F.2d 204 (4th Cir. 1991), which held that punitive damages "were unavailable under § 504," was "no longer * * * good law" in light of *Franklin*. 13 F.3d at 830. Because, in its view, *Franklin* requires that "a full panoply of legal remedies" (including punitive damages) be available under Section 504, see 13 F.3d at 830-32, the Fourth Circuit held that "a jury trial is constitutionally mandated under § 504." *Id.* at 832.

The Third Circuit recently took sides in this debate as well. In *Doe* v. *County of Centre*, 242 F.3d 437 (3d Cir. 2001), it held – consistent with the Sixth Circuit's decision in *Moreno* but in conflict with *Pandazides* and the Eighth Circuit's decision below – that punitive damages are not recoverable in an action brought against a municipal government under Section 504 of

the Rehabilitation Act and Section 202 of the ADA. Relying primarily on *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), which rejected municipal liability for punitive damages under 42 U.S.C. § 1983, the Third Circuit rejected the argument (accepted by the Eighth Circuit in this case) that *Franklin* requires a different result. *Id.* at 456-58. The Third Circuit recognized (*id.* at 456) that "the Fourth Circuit held in *Pandazides*" that a "plaintiff could seek punitive damages under Section 504," but pointedly refused to follow the Fourth Circuit's lead.[5] The Third Circuit also acknowledged (*ibid.*) the conflict between *Pandazides* and *Moreno*.[6]

3. Although the remaining circuits have yet to issue definitive rulings on the question presented, the existence of a circuit conflict has not gone unnoticed. The Tenth Circuit, in expressly reserving the issue "whether punitive damages are available under Section 504," has acknowledged the conflict between *Moreno* and *Pandazides*. *Roberts* v. *Progressive Independence, Inc.*, 183 F.3d 1215, 1223 (10th Cir. 1999). So, too, has the Second Circuit in recently declining to decide the availability of punitive damages under Title VI. *Tolbert* v. *Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001).[7] And not

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[5] District courts in the Fourth Circuit have followed *Pandazides*'s holding concerning the availability of punitive damages. See, *e.g.*, *Proctor* v. *Prince George's Hosp. Center*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (rejecting argument "that punitive damages are not available under the Rehabilitation Act" on ground that it "directly contradicts *Pandazides*"). Cf. *Turner* v. *First Hosp. Corp. of Norfolk*, 772 F. Supp. 284, 287-88 (E.D. Va. 1991) (holding punitive damages unavailable in decision predating *Pandazides*).

[6] District courts in the Sixth Circuit have since applied *Moreno* in a number of cases. See, *e.g.*, *Dorsey* v. *City of Detroit*, 157 F. Supp. 2d 729, 731 (E.D. Mich. 2001); *Key* v. *Grayson*, 2001 WL 1083714, at *6, *19 (E.D. Mich. Sept. 5, 2001); *Ability Center of Greater Toledo* v. *Sandusky*, 133 F. Supp. 2d 589 (N.D. Ohio 2001).

[7] Many district courts have likewise taken note of the circuit conflict.

surprisingly, in the absence of dispositive circuit court rulings, district courts outside the Third, Fourth, Sixth, and Eighth Circuits have reached conflicting results since *Franklin* on the question whether punitive damages may be recovered in an action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA:

- In the First Circuit, district courts generally have allowed punitive damages claims to proceed. See *Levier* v. *Scarborough Police Dep't*, 2000 WL 761003, at *1 (D. Me. May 10, 2000) (Section 504 and Section 202); *Kilroy* v. *Husson College*, 959 F. Supp. 22, 24 (D. Me. 1997) (Section 504); *McKay* v. *Winthrop Board of Education*, 1997 WL 816505, at *1, *2 (D. Me. June 6, 1997) (both provisions); *Penney* v. *Town of Middleton*, 888 F. Supp. 332, 342 (D.N.H. 1994) (Section 504).

- In the Second Circuit, district courts have reached conflicting results. Compare *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (punitive damages not available under Section 202), and *Kuntz* v. *City of New Haven*, 1993 WL 276945, at *18 (D. Conn. Mar. 3, 1993) (same under Section 504), with *Hunt* v. *Meharry Medical College*, 2000 WL 739551, at *4 (S.D.N.Y. June 8, 2000) (punitive damages available under Section 504), and *Hernandez* v. *City of Hartford*, 959 F. Supp. 125, 133-34 (D. Conn. 1997) (same under Sections 202 and 504), and *Zaffino* v. *Surles*, 1995 WL 146207, at *1-3 (S.D.N.Y. Mar. 31, 1995) (same under Section 504), and *DeLeo* v. *City of Stamford*, 919 F. Supp. 70, 72-74 (D. Conn. 1995) (same).

- In the Fifth Circuit, one district court has ruled that punitive damages may not be recovered under Section 504.

See, *e.g.*, *Proctor*, 32 F. Supp. 2d at 829-30 (conflict between *Moreno* and *Pandazides*); *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 482 n.15 (D.N.H. 1997) (same); *Kilroy* v. *Husson College*, 959 F. Supp. 22, 24 (D. Me. 1997) (same).

See *United States* v. *Forest Dale, Inc.*, 818 F. Supp. 954, 970 (N.D. Tex. 1993).

- In the Seventh Circuit, district courts have reached conflicting decisions. Compare *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1024-25 (N.D. Ill. 1997) (punitive damages not recoverable under Section 202), and *Dertz* v. *City of Chicago*, 1997 WL 85169, at *20 (N.D. Ill. Feb. 24, 1997) (same under Section 202 and Section 504), with *Garrett* v. *Chicago School Reform Board of Trustees*, 1996 WL 411319, at *3-4 (N.D. Ill. July 19, 1996) (punitive damages available under Section 202 and Section 504), and *Simenson* v. *Hoffman*, 1995 WL 631804, at *6-7 (N.D. Ill. Oct. 24, 1995) (same under Section 504).

- In the Ninth Circuit, district courts have allowed punitive damages claims. See *Henkle* v. *Gregory*, 150 F. Supp. 2d 1067, 1077-78 (D. Nev. 2001) (Section 504); *Patricia N.* v. *Lemahieu*, 141 F. Supp. 2d 1243, 1252-53 (D. Haw. 2001) (Section 202 and Section 504); *Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144, 1146-52 (D. Haw. 1997), appeal dismissed, 165 F.3d 1257 (9th Cir. 1999).

- In the Tenth Circuit, one district court has ruled that punitive damages may not be recovered under Section 504. See *Tafoya* v. *Bobroff*, 865 F. Supp. 743, 748, 751 (D.N.M. 1994), aff'd mem., 74 F.3d 1250 (10th Cir. 1996); cf. *Roberts*, 183 F.3d at 1223 (reserving issue).

- In the Eleventh Circuit, one district court has ruled that punitive damages may not be recovered against a municipal government on a claim brought under Section 202 of the ADA. See *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468-69 (M.D. Ala. 1994).[8]

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[8] The division of authority has not escaped the notice of commentators. See, *e.g.*, 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 224, 227 (2000 Cum. Supp.); *Remedies – Punitive Damages – Americans with Disabilities Act – Rehabilitation Act*, FED. LITIGATOR,

4. This Court should intervene now to resolve the 2-2 circuit conflict and bring uniformity to this important area of federal law. Federal law should not impose punitive liability under Section 504 of the Rehabilitation Act and Section 202 of the ADA on municipal governments (and other defendants) in Arkansas, Iowa, Maryland, Minnesota, Missouri, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Virginia, and West Virginia but not on similarly situated defendants in Delaware, Kentucky, Michigan, New Jersey, Ohio, Pennsylvania, Tennessee, and the Virgin Islands.

Nor is there any realistic possibility that the entrenched conflict in the circuits will disappear. The Sixth Circuit's decision in *Moreno* was rendered by an en banc court and has since been extended to claims brought under Section 202 of the ADA. *Johnson* v. *City of Saline*, 151 F.3d 564, 573 (6th Cir. 1998). And the Eighth Circuit in this case declined (over the dissenting votes of Judges Bowman and Loken) to rehear this case en banc, notwithstanding the acknowledged conflict with the Sixth Circuit. App., *infra*, 52a. The panel itself pleaded for clarification by this Court. *Id.* at 15a-16a.

Finally, the entrenched conflict in the circuits comes down, in the end, to a fundamental disagreement over the meaning of *Franklin*. As noted above, that disagreement is apparent in a comparison of *Moreno* and the Eighth Circuit's decision in this case. Even in cases not involving the federal statutes governing disability, race, or gender discrimination in the provision of public services, courts of appeals have adopted vastly different understandings of what *Franklin* requires. Compare *Reich* v. *Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1190-92, 1194

Sept. 2001, at 236, 237 (noting circuit split); Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U.L. REV. 323, 415 & n.425 (1999) ("courts remain split on the availability of punitive damages claims under section 504") (collecting cases); Tucker, *Access to Health Care for Individuals with Hearing Impairments*, 37 HOUSTON L. REV. 1101, 1128-29 (2000).

(1st Cir. 1994) (relying on the "broad and unequivocal language in *Franklin*" as a basis for construing the statutory phrase "all appropriate relief" in Section 11(c) of the OSH Act, 29 U.S.C. § 660(c), as authorizing a punitive award of double backpay damages), with *Knapp* v. *Eagle Property Management Corp.*, 54 F.3d 1272, 1277-79 (7th Cir. 1995) (refusing to read *Franklin* as "dictating the conclusion that *all* monetary damages are recoverable in every implied cause of action," and disallowing certain forms of compensatory damages in discrimination action brought by participant in federal rent assistance program under 42 U.S.C. § 1437f(t)(1)(B)). Because only this Court can clarify *Franklin*'s meaning, and its relationship to the principles underlying *City of Newport*, further review is needed.

B. THE ISSUES RAISED ARE IMPORTANT AND RECURRING

Whether the courts should recognize a punitive damages remedy under Section 504 of the Rehabilitation Act and Section 202 of the ADA is an important question of federal law. As the many cases cited above make clear, this issue has arisen with great frequency in the federal courts (and indeed has the potential to arise in virtually any case brought under these statutory provisions). That is a substantial category of litigation because each of these provisions has an exceedingly broad reach. See pages 9-10, *supra*. See also 42 U.S.C. § 12131(1) (ADA provision broadly defining "public entity"); 29 U.S.C. § 794(b) (defining "programs" and "activities" subject to Section 504 as including "all of the operations of" a broad range of entities). As the Sixth Circuit has correctly observed (and as this case graphically illustrates), "the phrase 'services, programs or activities'" in Section 202 of the ADA "encompasses virtually everything that a public entity does." *Johnson* v. *City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998).

Moreover, because the Rehabilitation Act (like other statutes) specifically borrows the remedies available under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the proper resolution of this case is likely to affect the availability of puni-

tive damages under Title VI as well as other closely related provisions of federal civil rights laws, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). This close linkage is confirmed by the Eighth Circuit's decision, which rested on the premise that punitive damages are also available under Title VI. App., *infra*, 11a ("we must * * * conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI"); *id.* at 13a (*Franklin* "compel[s]" this conclusion). As this Court is well aware, the volume of litigation brought under these related federal civil rights laws is also quite substantial. See, *e.g.*, *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274, 292 (1998) ("The number of reported [Title IX] cases concerning sexual harassment of students in schools confirms that harassment is an all too common aspect of the educational experience."). It therefore comes as no surprise that, since *Franklin*, numerous lower courts have considered whether punitive damages are recoverable in cases brought under Title VI[9] or Title IX.[10]

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[9] See. *e.g.*, *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (punitive damages unavailable under Title VI); *Sims* v. *Unified Government of Wyandotte County*, 120 F. Supp. 2d 938, 947 (D. Kan. 2000) (same); see also *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Maine 1985) (same) (pre-*Franklin*). But see *Davison* v. *Santa Barbara High School Dist.*, 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998) (punitive damages available under Title VI). Cf. also *Tolbert* v. *Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001) (declining to decide issue).

[10] See, *e.g.*, *Landon* v. *Oswego Unit School Dist. No. 308*, 143 F. Supp. 2d 1011, 1013-14 (N.D. Ill. 2001) (punitive damages unavailable under Title IX); *Booker* v. *City of Boston*, 2000 WL 1868180, at *4 (D. Mass. Dec. 12, 2000) (same); *Morlock* v. *West Central Education Dist.*, 46 F. Supp. 2d 892, 924 (D. Minn. 1999) (same); *Crawford* v. *School Dist. of Philadelphia*, 1998 WL 288288, at *2 (E.D. Pa. June 3, 1998) (same); *Doe* v. *Londonderry School Dist.*, 970 F. Supp. 64, 75-76 (D.N.H.) (same), modified in other respects, 32 F. Supp. 2d 1360 (1997); *Collier* v. *William Penn School Dist.*, 956 F. Supp.1209, 1217 (E.D. Pa. 1997) (same), rev'd mem., 191 F.3d 444

In recent years, this Court has repeatedly granted review to resolve conflicts over the meaning of these important federal statutes (as well as the related provisions in Title VI and Title IX). See, *e.g.*, *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001); *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999); *Gebser*, *supra*; *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998); *Lane* v. *Peña*, 518 U.S. 187 (1996); *Franklin*, *supra*. Most of these cases, moreover, have involved the scope of liability or remedies under implied rights of action. See also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *Guardians Ass'n* v. *Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Lau* v. *Nichols*, 414 U.S. 563 (1974). The Court's extensive activity in this area demonstrates not only the complex nature of this body of law and the Court's special role in defining implied rights of action but also the national importance of questions arising under the federal civil rights laws.

Finally, the issues raised in this case have special importance for municipal governments.[11] If review is granted, petitioners will argue not only that punitive damages are gen-

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(1999). See also *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 481-84 (D.N.H. 1997) (discussing issue without resolving it). But see *Canty* v. *Old Rochester Regional School Dist.*, 66 F. Supp. 2d 114, 118 (D. Mass. 1999) (plaintiff may recover punitive damages, but only upon a showing that school district "continues to commit egregious violations of Title IX" at time of trial "with no sign of relenting").

[11] They also have significance for the States, which have been held to waive their Eleventh Amendment immunity from suit under Section 504 of the Rehabilitation Act when they accept federal funds. See *Jim C.* v. *United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc), cert. denied, 121 S. Ct. 2591 (2001). Moreover, the lower courts are divided over whether Congress validly abrogated the States' Eleventh Amendment immunity under Title II of the ADA, which includes Section 202. See *Doe* v. *Division of Youth & Family Servs.*, 148 F. Supp. 2d 462, 485-86 (D.N.J. 2001) (collecting cases); App., *infra*, 5a.

erally unavailable under the relevant provisions of the Rehabilitation Act and ADA, but also that, at a minimum, punitive damages are unavailable on claims asserted against municipal governments. This case accordingly is important because of its potential to clarify the applicability of the principles underlying *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), outside the context of 42 U.S.C. § 1983. Moreover, the ramifications for municipal treasuries can hardly be overstated. In this case, respondent (in addition to being fully compensated) was awarded punitive damages of $1.2 million. And, of course, the mere availability of punitive damages will have the obvious effect of raising settlement values in cases brought under the relevant civil rights laws, with attendant, adverse consequences for government treasuries (and therefore for taxpayers).

C. THE DECISION BELOW IS MANIFESTLY INCORRECT

Further review is also warranted because the Eighth Circuit's decision is seriously flawed. The court of appeals has upheld the availability of punitive damages under the Rehabilitation Act even though – as the lower court candidly acknowledged – there was "near unanimity" in the federal courts in the first two decades of that statute's life that it would *not* support a claim for punitive damages (and neither would Title VI or Title IX). App., *infra*, 12a. The Eighth Circuit approved punitive liability even while acknowledging that, when Congress in 1991 amended *other* provisions of the Rehabilitation Act and the ADA to allow a limited punitive damages remedy subject to a cap, it "considered the new language necessary to create a punitive damages remedy under the acts" and "intended to expand, and not contract, the available remedies." *Id.* at 15a. And the lower court reached that result in a case involving a municipal defendant, even though "municipal immunity from punitive damages" was firmly "established at common law" more than a century ago and "has persisted to the present day in the vast majority of jurisdictions." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258-61 (1981).

Why? In the Eighth Circuit's view, this stark break with tradition was "compel[led]" by this Court's decision in *Franklin*. App., *infra*, 10a. In the lower court's view, *Franklin* created a "one-way ratchet" under which, "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." App., *infra*, 14a (emphasis added). Moreover, unless Congress "expressly limit[s] the remedies available" (*id.* at 12a) – which is no small feat given that the private right of action is implied (as well as subsequently defined by the judiciary) – courts must ignore other, telling evidence of congressional intent, such as the legislative intent underlying amendments made to the statute, the backdrop of judicial interpretation at the time such amendments are made, and even principles of governmental immunity that have been settled for more than a century. The consequence of that sweeping approach to implied rights of action, perversely enough, is that "the most questionable of private rights will also be the most expansively remediable." *Franklin*, 503 U.S. at 78 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring in the judgment). There is absolutely no basis for that result.

1. To begin with, *Franklin* is simply not the judicial straitjacket the court of appeals thought it to be. As the Sixth Circuit correctly recognized, *Franklin* invites courts to "engage in a two-part inquiry": first, "whether there is any clear indication of congressional intent to limit the presumption in favor of any and all appropriate damage remedies; and second, absent any such indication, * * * whether the remedy in question is 'appropriate.'" *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir.1996) (en banc). But there is nothing in *Franklin* that forbids courts, during the first step of that inquiry, to consider legislative amendments, the "background against which Congress was legislating" (*id.* at 789), and any other evidence that might shed light on whether Congress lacked an intent to authorize a particular remedy. Similarly, there is no basis on which to interpret *Franklin*'s reference to "appropriate" remedies nar-

rowly as meaning "'appropriate' *in a specific case*" (App., *infra*, 16a (emphasis added)). A remedy may be "inappropriate" for a particular statutory scheme, or because it undercuts well-established principles of law, and not just because it does not fit the conduct at issue in a particular lawsuit. See *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-52 (1979) (rejecting implied remedy of punitive damages under the Railway Labor Act as inconsistent with national labor policy).

2. Several of this Court's decisions since *Franklin* demonstrate the error of the Eighth Circuit's approach. In *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), this Court rejected an argument predicated on an expansive reading of *Franklin*. In that case, which (like *Franklin* itself) involved a Title IX action for damages brought against a school district, the Court pointed out that it had "made no effort in *Franklin*" to specify "the circumstances in which a damages remedy should lie." *Id.* at 284. Moreover, the Court emphasized that, "[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Ibid.* *Franklin*'s "general rule" concerning the availability of all appropriate relief, the Court observed, must "yield[] where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Id.* at 285 (internal quotations omitted).

Applying those principles, the Court held that it would frustrate the purposes of Title IX to allow recovery against a school district on the basis of *respondeat superior* or a theory of constructive notice. *Gebser*, 524 U.S. at 285. In words equally applicable to this case, the Court emphasized that, "[w]hen Title IX was enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief." *Ibid.* The Court also reasoned that the "implied damages remedy should be fashioned along the same lines" as Title IX's "express remedial scheme," which

allows for suspension or termination of federal funding and "is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation, 20 U.S.C. § 1682." *Id.* at 290. The Court relied as well on the fact that "[i]t was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case." *Id.* at 286. "Adopting petitioner's position," the Court explained, "would amount * * * to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Ibid.*

Here, as in *Gebser*, the Eighth Circuit should have taken account of the fact that when the Rehabilitation Act was enacted in 1973 – *and* when it was amended in 1986, 1987, and 1991 – there was "near unanimity" (App., *infra*, 12a) in the federal courts about the *unavailability* of punitive damages (and similar unanimity existed at that time with respect to Title VI and Title IX). See also *Moreno*, 99 F.3d at 789-91 (discussing this history and background understanding and concluding that it provided "a pretty clear indication" that "Congress did not intend to allow" punitive damages). Here, as in *Gebser*, the Eighth Circuit should have recognized that it possessed a "measure of latitude" in applying *Franklin* and should have considered the implications of Congress's creation in 1991 of a limited punitive damages remedy applicable to *other* provisions of the Rehabilitation Act (and inapplicable to municipal governments). And here, as in *Gebser*, the Eighth Circuit should have recognized that any inquiry into Congress's intent under *Franklin* must be informed by such considerations as the Rehabilitation Act's "express remedial scheme" and whether punitive damages would be consistent with the purposes underlying the statutes. The Eighth Circuit, however, did none of this.

The error in the court of appeals' analysis is also demonstrated by *Lane* v. *Peña*, 518 U.S. 187 (1996), where this Court

held that a private plaintiff suing under Section 504 of the Rehabilitation Act may not recover monetary damages against the *federal* government. Rejecting another argument that *Franklin* mandated a contrary result, the Court explained that *Franklin* "involved an action against nonfederal defendants under Title IX" and could not be applied "wholesale" to actions against the federal government given the federal government's traditional immunity. 518 U.S. at 196-97. Here, as in *Lane*, any inquiry into available remedies and Congress's intent should have taken into account the backdrop of well-settled governmental immunities. *City of Newport*, *supra*. The Eighth Circuit failed to do so, contrary to the teachings of *Lane*.

3. Had the Eighth Circuit's taken account of these considerations, rather than applying a cramped and incorrect interpretation of *Franklin*, it would have found ample evidence that Congress never intended to authorize the recovery of punitive damages under Section 504 of the Rehabilitation Act or Section 202 of the ADA (and that such a remedy was wholly inappropriate). We outline below several of the most obvious considerations pointing toward this conclusion.

a. As the lower court correctly noted, "Congress extended the remedies available under Title VI to section 504 in 1978, 29 U.S.C. § 794a, and then to section 202 [of the ADA] in 1990, 42 U.S.C. § 12133." App., *infra*, 12a. Congress made further amendments to the Rehabilitation Act in 1986, 1987, and 1991. See pages 3-4, *supra*. At the time Congress enacted these remedial provisions and further amendments, "punitive damages had never been awarded under § 504 and were widely believed to be unavailable under that section" as well as "under Title VI." *Moreno*, 99 F.3d at 790 (citing cases); see also App., *infra*, 13a-14a & n.9 (same). "The repeated * * * amendments to the Rehabilitation Act without altering the existing understanding that punitive damages were not available under § 504 [are] a pretty clear indication * * * that Congress did not intend to allow such damages." *Moreno*, 99 F.3d at 791; accord *Gebser*, 524 U.S. at 285.

b. The Civil Rights Act of 1991 strongly confirms Congress's lack of intent to authorize (and the inappropriateness of) punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA. The 1991 Act created a limited and carefully defined right to recover punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applied to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. It did *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see *County of Centre*, 242 F.3d at 457.

As the Eighth Circuit recognized in this case, but inexplicably failed to credit, the "text and history of the 1991 Act" make clear that in enacting these provisions "Congress intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA. App., *infra*, 15a; see also *ibid.* (making same observation about legislation proposed, but not enacted, in 1992). See generally *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533, 534 (1999) ("Congress provided for *additional* remedies, including punitive damages for certain classes of Title VII and ADA violations.") (emphasis added). Moreover, as several courts have recognized,[12] the mere juxtaposition, without more, of the limited punitive damages provisions of the 1991 Act (42 U.S.C. § 1981a) on the one

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[12] See, *e.g.*, *Bayon* v. *State University of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (1991 Act's creation of punitive damages remedy under Title I of ADA "counsels against any inference that punitive damages are available under Title II"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994) (same). But see *Kedra* v. *Nazareth Hosp.*, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (relying on 1991 Act's creation of punitive damages remedy under Title VII as reason for permitting punitive damages under Section 504).

hand, and the remedial provision governing Section 504 and Section 202 (29 U.S.C. § 794a; 42 U.S.C. § 12133) on the other, provides structural evidence of an intent on Congress's part not to authorize punitive damages under the latter provisions. See also *Kolstad*, 527 U.S. at 534 ("The very structure of § 1981a suggests a congressional intent to authorize punitive damages only in a subset of cases involving intentional discrimination"). Finally, Congress's express exemption of governmental entities from punitive liability under the 1991 Act provides powerful evidence of Congress's intent not to permit punitive liability in a case such as this. See also *Gebser*, 524 U.S. at 285 (refusing to "allow[] unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence [in the 1991 Act] that when Congress expressly considered both in Title VII it restricted the amount of damages available").

c. In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive damages. *Id.* at 259-63. Next, the Court scoured the legislative history of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for evidence that Congress "intended to disturb the settled common-law immunity," of which Congress was presumptively aware. 453 U.S. at 263-266. Finally, the Court examined "whether considerations of public policy dictate" recognition of a punitive damages remedy against municipalities despite the longstanding immunity and the absence of evidence of congressional intent to impose such novel liability. *Id.* at 267-71.

In holding that Section 1983 does not impose punitive liability on municipal governments, this Court explained that the deterrent and retributive objectives underlying punitive damages are not served by imposing them on municipalities. "Regarding retribution," the Court stated, "it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the

tort." 453 U.S. at 267. Punitive damages in this setting, the Court added, "are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for citizens footing the bill." *Ibid.* The Court explained that the goal of deterrence is not served by the imposition of punitive damages. *Id.* at 268-70. Finally, the Court expressed concern over the "very real" costs and risks associated with allowing private individuals to visit punishments upon municipal governments. See *id.* at 270-71.

As the Third Circuit recognized in its conflicting decision in *County of Centre*, 242 F.3d at 456, "[t]he principles derived from *City of Newport* are directly applicable to" Section 504 of the Rehabilitation Act and Section 202 of the ADA. In determining whether Congress intended to allow punitive damages against municipalities under these statutes, as well as whether such damages are "appropriate" within the meaning of *Franklin*, the Eighth Circuit should have taken into account the long history and compelling policy rationales described in *City of Newport*. Moreover, it should have asked whether there was any evidence of congressional intent to depart *not* from *Franklin*'s general rule concerning the availability of all appropriate relief, but rather from the general immunity enjoyed by municipalities. *County of Centre*, 242 F.3d at 456. Its failure to do so was error. That error is further confirmed, moreover, by the 1991 Act's exemption of municipalities and other government entities from punitive liability under other provisions of the Rehabilitation Act and the ADA.[13]

d. In *Gebser*, this Court reasoned that the "implied damages remedy" under Title IX "should be fashioned along the same lines" as the statute's "express remedial scheme," which

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[13] In the Eighth Circuit, petitioners maintained that the Board was an "arm of the state" and thus entitled to Eleventh Amendment immunity. The court of appeals, however, rejected that submission. App., *infra*, 5a-8a. As this case comes to the Court, therefore, it can be assumed that the Board is, in essence, a municipal entity.

allows for suspension or termination of federal funding. 524 U.S. at 290. In this case, in contrast, the Eighth Circuit read *Franklin* as barring any inference that could be drawn about the availability of punitive damages from Congress's inclusion of administrative remedies to guard against fund recipients' violations of the Section 504 of the Rehabilitation Act or Section 202 of the ADA. App., *infra*, 10a n.6 (under *Franklin*, "administrative and private causes of action" must be treated as "separate and distinct"). That, too, was error.

Had the Eighth Circuit examined the "express remedial scheme" applicable to Section 504 of the Rehabilitation Act, it would have concluded – as the Sixth Circuit did in *Moreno* – that "Congress has chosen other ways to 'punish' those who violate § 504." 99 F.3d at 791. In particular, "a punishment of cutoff of federal funds is one of the remedies available" under the statute." *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Maine 1985) (citing this as a ground for disallowing punitive damages in case brought under Title VI); see also *Moreno*, 99 F.3d at 791-92; *DeLeo* v. *City of Stamford*, 919 F. Supp 70, 74 n.7 (D. Conn. 1995). Indeed, one reason for this Court's recognition under Title IX of a private right of action was to provide an alternative to the "severe" remedy of funding termination. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979); see also *Doe* v. *Oyster River Co-op. School Dist.*, 992 F. Supp. 467, 482-83 (D.N.H. 1997) (surveying legislative history of Title IX and identifying evidence that "Congress was leery of giving private litigants the power to threaten grant recipients with large, punitive sanctions").

e. Finally, in enacting Section 504 of the Rehabilitation Act, Congress acted pursuant to its Spending Clause powers. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). To "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation," this Court

has "insist[ed] that Congress speak with a clear voice" when imposing conditions on the receipt of federal funds. *Ibid.* Moreover, this Court made clear in *Gebser* that the "contractual nature" of Spending Clause statutes "has implications for our construction of the scope of the available remedies." 524 U.S. at 287. Because the common law generally does not recognize punitive damages as remedy for breach of contract, see RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981), it is doubtful that punitive damages should *ever* be awarded as a remedy in cases involving Spending Clause legislation. At a minimum, courts should require an unequivocal statement of congressional intent before allowing such a remedy. This the Eighth Circuit failed to do.[14]

Taken together, these serious errors in the Eighth Circuit's analysis provide further reason why this Court should accept the court of appeals' invitation "to inject additional clarity into this area" of law. App., *infra*, 16a. And there is no good reason not to accept that invitation *now*. The fact that the court of appeals remanded to the district with instructions to determine whether the punitive damages award was "appropriate" in this "specific case" (*ibid.*) is no reason to delay review of this long-running case, which has already taken three trips to the Eighth Circuit. See *id.* at 2a, 39a & n.4; *Gorman* v. *Bartch*, 123 F.3d 1126 (8th Cir. 1997); see also *Foust*, 442 U.S. at 45 (exercising review to decide analogous issue despite court of appeals' remand for excessiveness review). Moreover, the panel squarely rejected the argument that punitive damages are unavailable as a matter of law in implied actions brought under

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[14]It is especially difficult, moreover, to see how petitioners could have understood in 1992 that a condition placed on the Board's receipt of federal funds was the potential liability for punitive damages, since (1) it was "not until 1994" (several years after respondent's arrest) that there was even "a single case where punitive damages were awarded under § 504" (*Moreno*, 99 F.3d at 790), and (2) it was unclear that the relevant statutes even applied in this situation, as the court of appeals explained in upholding qualified immunity in a prior appeal (App., *infra*, 46a-50a).

Section 504 of the Rehabilitation Act and Section 202 of the ADA; and it gave the word "appropriate" an unduly narrow (and in our view incorrect) interpretation that will govern any remand proceedings and limit petitioners' ability to demonstrate inappropriateness. Because the important and clear-cut legal issues decided by the panel are fundamental to the conduct of any future proceedings on remand – and because they will continue to have sweeping implications for a wide array of other cases, *regardless* of the outcome of this particular dispute – review should not be delayed. See *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2001

APPENDICES

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 00-1029/00-1030

Jeffrey Gorman, Appellant/Cross-Appellee,

v.

Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri Police Department; Dr. Stacey Daniels-Young, in her official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Jeffrey J. Simon, in his official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Joseph J. Mulvihill, in his official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Dennis C. Eckhold, in his official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Kay Barnes, in her official capacity as member of the Board of Police Commissioners of Kansas City, Missouri; Neil Becker, in his official capacity as a member of the Kansas City Police Department, Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 8, 2001
Filed: June 13, 2001

Before BEAM, MORRIS SHEPPARD ARNOLD, Circuit Judges and ALSOP,[1] District Judge.

BEAM, Circuit Judge.

We have twice before heard appeals in this case. It has now been tried before a jury, which rendered a verdict against the defendant appellees (collectively "the Police Board" or "the Board"). Jeffrey Gorman now appeals the district court's post-trial ruling that punitive damages are not available under the Rehabilitation Act and the Americans with Disability Act. The Board, for its part, asserts Eleventh Amendment immunity, and appeals various trial court rulings. We reverse and remand for further proceedings.

I.

A January 1988 auto accident left Jeffrey Gorman a paraplegic. He lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist, which must be emptied in order to prevent urine from backing up into his body and causing an infection or a kidney disorder.

One Saturday night in May 1992, Gorman and a friend were in the Westport area of Kansas City, Missouri, where they entered a dance club called "Guitars and Cadillacs." While in the club, the two became involved in an altercation with a bouncer, which ultimately resulted in Gorman's forceful ejection from the premises. Outside, Gorman approached several police officers, hoping they would intercede on his

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[1] The Honorable Donald D. Alsop, United States District Judge for the District of Minnesota, sitting by designation.

behalf. In fact, the officers were off-duty and working as private security for Westport. The officers told Gorman that he had to leave. When he refused, they placed him under arrest for trespass.

While waiting for the police van, Gorman told the officers that he had to go to the restroom to empty his full urine bag, but was told to wait until he got to the station. When the van arrived it lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Rather, it contained only a narrow bench. Gorman told the officers that he could not possibly ride in it. Given his inability to stay upright without his wheelchair, Gorman thought he would fall from the bench. Gorman testified that he told the officers this, that he told them how to lift him from his chair, and that he needed his molded cushion. Regardless, the officers placed Gorman on the bench and used a seatbelt to strap him in. The seatbelt did not properly hold Gorman upright, and it lay across his already full urine bag. Gorman testified that after he complained about the seatbelt, the officers loosened it, and used Gorman's own belt to strap him to the mesh behind the bench in order to hold him upright. The officers were unable to fold the wheelchair, and placed it, unfolded, in the back of the van.[2]

Officer Becker, the van driver and only on-duty officer involved, then drove the van away from the scene. Gorman testified that his body swayed with every turn and acceleration. Gorman admitted that he released his seatbelt out of concern over the pressure it was placing on his urine bag. Eventually, the other belt also came undone and Gorman fell to the van floor. The impact from the fall exploded Gorman's urine bag,

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[2] Almost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent. As Gorman prevailed below, we present his version of events.

soaking him with his own urine. Noticing that Gorman had fallen, Officer Becker stopped the van. Unable to lift Gorman by himself, Officer Becker tied him to a support in the back of the van for the duration of the trip. The trip also damaged the wheelchair. After arriving at the station, Gorman was booked, processed and released. He was subsequently convicted of misdemeanor trespass.

After these events, Gorman began having medical difficulties. He suffered a bladder infection from urine backing up into his system and began suffering serious lower back pain. Whereas prior to that night he had been active and pain-free, his injuries left him unable to work a full day, suffering frequent pain, uncontrollable spasms in his paralyzed areas, and shoulder problems. Expert testimony suggested that these injuries and the resulting pain are permanent.

Gorman sued the Police Board under Title V, section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("section 504"), and Title II, section 202 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 ("section 202"). Section 504 prohibits disability-based discrimination in any public program receiving federal funds. Section 202 more generally prohibits disability-based discrimination in any public program or services regardless of the receipt of federal funds. In *Gorman* v. *Bartch*, 152 F.3d 907, 912-13 (8th Cir.1998), we held that despite Gorman's involuntary participation in the public services provided to detainees, he could pursue his claim under sections 504 and 202. After a trial, a jury found the defendants liable and awarded Gorman actual damages of $1,034,817.33 and punitive damages of $1,200,000.[3] This appeal followed.

[3] The district court submitted Gorman's ADA and Rehabilitation Act claims in a unified instruction. Gorman can therefore prevail if the evidence supports the jury's finding under either Act.

II.

We begin with the Police Board's claim of sovereign immunity. The Board interposes as dispositive our holding in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir.1999), *cert. denied sub nom., Alsbrook* v. *Arkansas*, 529 U.S. 1001, 120 S.Ct. 1265, 146 L.Ed.2d 215 (2000), that the Eleventh Amendment bars suits against the states in federal court under section 202. Gorman argues the Police Board's failure to similarly address his section 504 claim renders that argument moot. However, the Eleventh Amendment implicates our jurisdiction, which we are obliged to explore even where the parties fail to do so. *Long* v. *Bureau of Reclamation*, 236 F.3d 910, 916 (8th Cir.2001). We are therefore bound to consider whether sovereign immunity prevents Gorman from bringing a claim against the Police Board under either statute. *Alsbrook* alone does not dispose of that issue, for it leaves us with two questions: whether sovereign immunity similarly bars suits against a state in federal court under section 504; and whether the Police Board constitutes an arm of the state entitled to sovereign immunity. Because we resolve the latter question in the negative, we do not reach the former.

Sovereign immunity extends to states and "arms" of the state, but not to local governments. *Alden* v. *Maine*, 527 U.S. 706, 756, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999); *Merrill Lynch, Pierce, Fenner and Smith, Inc.* v. *Nixon*, 210 F.3d 814, 819 (8th Cir.), *cert. denied*, 531 U.S. 958, 121 S.Ct. 383, 148 L.Ed.2d 295 (2000). Whether an entity constitutes such an "arm" turns on its relationship to the state under state law.[4]

[4] Gorman argues that the denial of Eleventh Amendment immunity to bi-state agencies organized under federal law in *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 38 & n. 8, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), undercuts the Police Board's claim to immunity as a creature of state law. This argument could not be more wrong. Organization under state law, rather than federal law, makes it more likely that an

Regents of the Univ. of Cal. v. *Doe*, 519 U.S. 425, 430-31 & n. 5, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

In our own "arm of the state" jurisprudence, we have looked generally to three factors: (1) an agency's powers and characteristics under state law; (2) an agency's relationship to the state – its autonomy from the state and degree of control over its own affairs, and (3) whether any award would flow from the state treasury. *Treleven* v. *University of Minn.*, 73 F.3d 816, 818 (8th Cir.1996); *accord Hadley* v. *North Ark. Cmty. Tech. Coll.*, 76 F.3d 1437 (8th Cir.1996) (finding community college to be an arm of the state based upon the state's ultimate financial liability and the institution's status under state law); *Greenwood* v. *Ross*, 778 F.2d 448 (8th Cir.1985) (directing inquiry to degree of local autonomy and control and whether suit will draw payment from the state treasury). Because a state may only waive its immunity upon an "unequivocally expressed ... clear declaration" of an intent to do so, we give particular heed to a state's treatment of its subdivisions under its own laws. *College Savs. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (citations omitted). Likewise, we give substantial weight to whether litigation against a particular entity would draw on the public fisc. *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 38, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); *Regents*, 519 U.S. at 430, 117 S.Ct. 900.

Our resolution of this issue in this case is guided by two holdings. The first is the Supreme Court's ruling in *Auer* v. *Robbins*, 519 U.S. 452, 456 n. 1, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), that the St. Louis Board of Police is not "an arm of the state." There, the Court noted that "[w]hile the Governor appoints four of the board's five members, the city of St. Louis

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agency is an arm of the state.

is responsible for the board's financial liabilities, and the board is not subject to the State's direction or control in any other respect. It is therefore not an 'arm of the State' for Eleventh Amendment purposes." *Id.* (citations omitted).

The elements relied upon by the Supreme Court in *Auer* were recently reaffirmed in *Smith* v. *Missouri*, No. W.D. 58882, 2001 WL 471937, at 1 (Mo.Ct.App. May 7, 2001), where the Missouri Court of Appeals addressed the question whether members of the St. Louis Police Board and police officers with the City of St. Louis were entitled to coverage under the Missouri State Legal Expense Fund. That fund makes money available for payment of damages levied against any state agency or officer or employee thereof. *Id.* at 2. The court undertook a rigorous analysis of the St. Louis Board of Police in order to determine whether it was the sort of state agency the creators of the Legal Expense Fund had intended to include under its coverage. The court noted that the Board is a creature of state, and not local law. *Id.* at 4. Moreover, it noted that the Board was intentionally set up to be above local political influence, and to that end, as the Supreme Court noted, four of the Board's five members are appointed by the Missouri Governor. *Id.* at 3-4. However, the court went on to note that the State's funding mechanism ensures that the St. Louis Board is funded by the people of St. Louis. *Id.* at 5-6. Finally, the court examined the St. Louis Board's functions and purpose, which relate primarily to the city.[5] In particular, the court noted that the state has no day-to-day control over the St. Louis Board. *Id.* at 7-8. In sum, the Missouri Court of Appeals concluded that at best, the St. Louis Board is a "hybrid agency." *Id.* at 6-8. As regards the Legal Expense Fund, the court concluded that "the legislature's intent in creating and maintaining the Fund is to provide coverage to those agencies and employees whose

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[5] A geographically-limited scope of responsibility does not necessarily deprive an entity of Eleventh Amendment immunity. *See, e.g., Power* v. *Summers*, 226 F.3d 815, 818 (7th Cir. 2000).

duties and actions directly impact the whole state and over which the state retains more direct control." *Id.* at 8. The St. Louis Board not being such an entity, the court concluded the state has no obligation to pay judgments against its members or officers. *Id.* at 11.

The Kansas City Board, at issue in this case, is similarly a creature of Missouri state law, and is managed in a substantially similar manner. Mo. Ann. Stat. §§ 84.350-84.870. Its functions are primarily local. Its structure mirrors that which the Supreme Court found in *Auer* to not be an arm of the state. Moreover, as the Missouri Court of Appeals confirmed in *Smith*, and as the Supreme Court stated in *Auer*, Board members are not subject to reimbursement from the state treasury for any money judgments rendered against them. Because for the purposes at issue in this case relevant state law treats entities such as the Board as not being a state agency, and because the state is not responsible for judgments against it, we conclude that the Kansas City Board does not constitute an arm of the state for purposes of Eleventh Amendment immunity.

III.

Gorman appeals the district court's post-trial ruling that neither section 504 nor section 202 permits punitive damages. We have twice permitted monetary remedies under section 504, *Rodgers* v. *Magnet Cove Pub. Schs.*, 34 F.3d 642 (8th Cir.1994); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.1982), but the availability of punitive damages remains an open question, *Gorman* v. *Bartch*, 152 F.3d 907, 910 n.2 (8th Cir.1998). This raises a question that only one other circuit has addressed. *See Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir.1996) (holding that punitive damages are not available under section 504). While we are sympathetic to the Sixth Circuit's conclusion, we find it foreclosed by controlling precedent.

Sections 504 and 202 both borrow their remedies from Title VI of the 1964 Civil Rights Act. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133. The pertinent question, therefore, is what remedies Title VI permits. Unfortunately, Title VI expressly provides neither a private cause of action nor remedies for such an action. *See* 42 U.S.C. §§ 2000d *et seq.* In *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-703, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), however, the Supreme Court held that Title IX of the Education Amendments of 1972 created an implied cause of action in its protected class. In doing so, the Supreme Court relied heavily on the fact that Title IX had been modeled on Title VI. The Court assumed Congress knew that Title VI had been interpreted by some lower courts to contain an implied cause of action. *Id.* at 696-97, 99 S.Ct. 1946. Therefore, the Court concluded, Congress must have intended Title IX to similarly include an implied cause of action. This reading has since been turned around to conclude that Title VI must also contain an implied cause of action. *Lane* v. *Pena*, 518 U.S. 187, 191, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 597, 612, 615-16, 635-36, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (seven members of the court recognizing implied action in Title VI in fragmented opinions). For our part, we have twice permitted damages under section 504, thereby corroborating, albeit without discussion, the notion that Title VI contains an implied cause of action. *Rodgers*, 34 F.3d 642; *Miener*, 673 F.2d 969.

We turn next to *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), which considered the remedies available under the cause of action implied in Title IX. There, the Court affirmed the rule, articulated earlier in *Bell* v. *Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946), that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin*, 503 U.S. at 70-

71, 112 S.Ct. 1028. The Supreme Court has long made clear that punitive damages are an integral part of the common law tradition and the judicial arsenal. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15-18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (reviewing history of punitive damages from Blackstone through the English and American courts); *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 370, 14 L.Ed. 181 (1852) (noting well established common law principle that juries may exact "exemplary, punitive or vindictive" damages). Punitive damages, therefore, fall within the panoply of remedies usually available to American courts. Given an implied cause of action in Title VI, *Franklin* compels the conclusion that absent express congressional statement to the contrary, Title VI also affords all appropriate remedies, including punitive damages.[6]

The Court in *Franklin* next took up "whether Congress intended to limit application of this general principle in the enforcement of Title IX." 503 U.S. at 71, 112 S.Ct. 1028. Because the cause of action in question was implied rather than expressed, the Court put aside what it considered a pointless discussion of legislative history.[7] *Id.* Rather, it looked to the judicial backdrop against which Congress had legislated. The

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[6] The availability of additional remedies is not precluded by Congress' express provision in Title VI of administrative remedies. It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). However, Title IX uses the same textual structure and remedies, yet in *Franklin* the Court found the implied private cause of action to sustain an award of monetary damages. This follows only if the administrative and private causes of action are separate and distinct such that a limitation on one does not operate against the other.

[7] That the cause of action was implied did not preclude the availability of remedies as the latter is analytically distinct from the question of whether a cause of action exists at all. *Franklin*, 503 U.S. at 65-66, 112 S.Ct. 1028.

Court observed that "[i]n the years before and after Congress enacted this statute, the Court followed a common-law tradition and regarded the denial of a remedy as the exception rather than the rule." *Id.* (quotation and brackets omitted). Once again indulging the assumption that Congress legislates in light of prevailing precedent, the Court found Congress to have intended the availability of all remedies. The Court then reviewed Congress' subsequent treatment of Title IX. In both 1986 and 1987, Congress amended Title IX without disturbing either the Court's holding in *Cannon*, that Title IX afforded a private remedy, or limiting the availability of remedies thereunder. In fact, the language of the 1986 amendment impliedly recognized the existence of a private cause of action. *Id.* at 72-73, 112 S.Ct. 1028. The Court concluded, "[o]ur reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX." *Id.* at 72, 112 S.Ct. 1028.

Application of *Franklin*'s methodology to this case must begin with the enactment of Title VI in 1964. *Cannon* and our own holdings in *Rodgers* and *Miener* compel the conclusion that in 1964 Congress created an implied cause of action in Title VI.[8] At that time, the rule in *Bell*, relied on in *Franklin*, that a cause of action affords all appropriate remedies unless expressly limited, was alive and well. As in *Franklin*, we must therefore conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI. Congress has not

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[8] When a court "implies" a cause of action it does not "create" it, but rather "discovers" it in an act of statutory construction. *See, e.g., Franklin*, 503 U.S. 71-72, 112 S.Ct. 1028; *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 430-31, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The upshot of this understanding is that the cause of action has always existed, despite having lain dormant. This logic holds for any judicial statutory interpretation — even those which change pre-existing interpretations. Regardless of the merits of this understanding, it flows from our judicial interpretive, as opposed to legislative, function.

since amended Title VI to limit any cause of action implied thereunder, nor the remedies that might accompany such a cause of action. Congress extended the remedies available under Title VI to section 504 in 1978, 29 U.S.C. § 794a, and then to section 202 in 1990, 42 U.S.C. § 12133. Congress has never expressly limited the remedies available under those sections either. Therefore, logic dictates, the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202.

The Sixth Circuit reached the contrary conclusion in *Moreno*, 99 F.3d 782. It relied largely on two concerns. First, it noted that since the enactment of these various sections, lower federal courts have been in near unanimity that they do not support punitive awards. *Id.* at 789-91. Second, given this fact, it pointed to the Civil Rights Act of 1991 as proof that Congress itself did not intend the availability of punitive damages. *Id.* at 790. It additionally pointed to this same evidence to support the proposition that punitive damages would not be "appropriate" in that case. *Id.* at 791- 92.

We are sympathetic to the Sixth Circuit's concerns, but find its methodology and conclusions foreclosed by *Cannon* and *Franklin*. The Sixth Circuit first pointed to the 1986, 1987 and 1991 amendments to the Rehabilitation Act and the ADA, wherein Congress amended these acts but did not disturb decisions ruling punitive damages unavailable under sections 504 and 202. Noting the assumption, made in *Franklin* and *Cannon*, that Congress legislates in light of then-prevailing judicial interpretations, the Sixth Circuit concluded "[t]he only inference of congressional intent that can be drawn from [the amendments] is that Congress intended § 504 remedies to remain *in statu quo – i.e.,* no punitive damages." *Id.* at 791.

This reasoning, however, misapplies the Supreme Court's methodology in *Franklin* and also undermines basic principles of statutory construction. *Franklin* first requires the determination of what remedies a statutory cause of action afforded at its enactment. It then permits reference to subsequent amendments only to see whether Congress later altered that initial understanding. This comports with the general rule that a statute adopts its meaning at the time of its enactment, and not at some later point by negative inference. In this case, because sections 504 and 202 draw their remedies from Title VI, the inquiry must start with the enactment of Title VI in 1964. As discussed above, *Cannon* and *Franklin* compel the conclusion that punitive damages were available as a remedy to a private cause of action under Title VI in 1964, and it is that assumption which provides the baseline against which subsequent amendments must be gauged. Therefore, the 1986, 1987 and 1991 amendments must be read as having not affected the status quo – that punitive damages are available under sections 504 and 202. To draw a contrary conclusion from those amendments would be to hold that Congress' understanding of section 504 in 1986 and 1987, and its understanding of sections 504 and 202 in 1991 trumped Congress' intent regarding those statutes when they were originally enacted, and in this way retroactively amended them. *See Brown & Williamson Tobacco Corp.* v. *FDA.*, 153 F.3d 155, 167 (4th Cir.1998) (noting that a statute's intent at the time of its enactment governs over subsequent congressional understandings) (citing *MCI Telecomm. Corp.* v. *AT & T*, 512 U.S. 218, 222, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)), *aff'd.* 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

Despite our conclusion, the Sixth Circuit's concerns are hardly misplaced. When Congress enacted the Rehabilitation Act and at the time of the subsequent amendments, courts generally agreed Title VI and section 504 did not afford monetary damages, and were in near unanimity that they did not

permit punitive damages.[9] However, the governing statutes and precedents in this case operate as a one-way ratchet: once a cause of action is discovered, it automatically entitles a plaintiff to all appropriate remedies; and that finding then extends those remedies to all other interrelated statutes. This now precludes consideration of what Congress intended through consideration of these earlier court decisions.

This tension becomes particularly clear in the context of the 1991 Civil Rights Act. The product of extensive compromise between President George Herbert Walker Bush and Congress, that Act amended the ADA and the Rehabilitation Act to permit limited punitive damages.

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[9] *See, e.g., Americans Disabled for Accessible Pub. Transp.* v. *SkyWest Airlines, Inc.*, 762 F.Supp. 320 (D.Utah 1991) (finding no punitive or compensatory damage remedy under section 504); *Doe* v. *Southeastern Univ.*, 732 F.Supp. 7 (D.D.C.1990) (limiting section 504 to equitable remedies); *Robinson* v. *University of Pa.*, No. 87-2476, 1988 WL 120738 (E.D.Pa. Nov.8, 1988) (holding neither punitive nor compensatory damages available under Title VI); *Singh* v. *Superintending Sch. Comm.*, 601 F.Supp. 865 (D.Maine 1985) (permitting compensatory remedy but not punitive remedy under Title VI); *Moreno* v. *Texas S. Univ.*, 573 F.Supp. 73 (S.D.Tex.1983) (finding no private cause of action for compensatory or punitive damages under Title VI); *Rendon* v. *Utah State Dep't of Employment Sec. Job Serv.*, 454 F.Supp. 534 (D.Utah 1978) (same). *But see Neighborhood Action Coalition* v. *City of Canton*, 882 F.2d 1012 (6th Cir.1989) (permitting Title VI action for compensatory and punitive damages to continue without addressing their availability); *Hutchings* v. *Erie City & County Library Bd. of Directors*, 516 F.Supp. 1265 (W.D.Pa.1981) (permitting damages remedies under section 504 in suit where plaintiff sought punitive damages); *Patton* v. *Dumpson*, 498 F.Supp. 933 (S.D.N.Y.1980) (finding section 504 to afford compensatory damages); *Gilliam* v. *City of Omaha*, 388 F.Supp. 842 (D.Neb.1975) (recognizing action for monetary damages under Title VI), *aff'd on other grounds*, 524 F.2d 1013 (8th Cir.1975). Since *Franklin*, courts have begun to re-evaluate these holdings. *See, e.g., Burns-Vidlak* v. *Chandler*, 980 F.Supp. 1144 (D.Haw.1997) (finding punitive and compensatory damages available under sections 504 and 202).

Specifically, it permitted employees suing under section 107(a) of the ADA and section 501 of the Rehabilitation Act to recover compensatory and punitive damages subject to statutory caps ranging from $50,000 to $300,000. 42 U.S.C. § 1981a. It did not, however, affect sections 504 or 202. The text and history of the 1991 Act suggest Congress intended to expand, and not to contract, the available remedies. Congress provided that a "complaining party may recover compensatory and punitive damages," using broadening, and not limiting language. 42 U.S.C. § 1981a(a)(2). Legislative history corroborates this interpretation. *See, e.g.*, H.R.Rep. No. 102-40(I & II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 673 (discussing punitive damage provisions as an expansion of remedies). The following year, those who had pushed for the inclusion of punitive damages in the 1991 Act introduced a bill to remove its damages caps. The proposed bill would have deleted 42 U.S.C. § 1981a(b)(3), which contains the caps, but would not have removed the language authorizing punitive and compensatory damages, suggesting that even then, they considered the new language necessary to create a punitive damage remedy under the acts. *See* Equal Remedies Act, S.Rep. No. 102-286 (1992), 1992 WL 113471 (Leg.Hist.); *see also Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 534, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) ("With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of ... violations.").

Applying the Supreme Court's reasoning in *Franklin* turns this understanding on its head. *Cannon, Rodgers* and *Miener* postulate the creation of a private cause of action in Title VI in 1964. Under *Franklin* we are to assume that action to have provided all remedies. Absent any subsequent contrary instruction, we are to assume those remedies to remain available under sections 504 and 202 today. We therefore rule, albeit not with great satisfaction, that these sections permit an award of punitive damages. Perhaps our parting ways with our sister

circuit will prompt the Supreme Court or Congress to inject additional clarity into this area.

Our analysis thus far does not entirely conclude this matter, as an award of damages must be "appropriate" in a specific case.[10] District courts must undertake an independent review of the evidence to determine whether it supports punitive damages. *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1025 (8th Cir.), *cert. denied,* 531 U.S. 825, 121 S.Ct. 70, 148 L.Ed.2d 35 (2000); *accord Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). The defendant's conduct must be shown to have been "motivated by evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others." *Smith* v. *Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); *see also Kolstad*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (discussing punitive damages scheme under 42 U.S.C. § 1981a). Punitive damages may also not be excessive. *Watkins* v. *Lundell*, 169 F.3d 540, 545 (8th Cir.), *cert. denied,* 528 U.S. 928, 120 S.Ct. 324, 145 L.Ed.2d 253 (1999). We have a subsequent obligation to review the district court's finding. At oral argument, Gorman's counsel admitted this to be the case and conceded that the district court did not do so, as it found punitive damages precluded as a matter of law. The facts in this case were hotly contested. We therefore remand for consideration of this point.

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[10] The *Moreno* court also argued that given the legislative and judicial backdrop, punitive damages were not "appropriate" as required by *Franklin*. *Moreno*, 99 F.3d at 791-92. We do not think the word "appropriate" to have been writ so large, and do not think the Court intended to create an escape hatch for all foregoing judicial interpretations. In his concurring opinion, Justice Scalia opined that given an action's implied nature, implied limitations on remedies ought also be considered. *Franklin*, 503 U.S. at 77-78 (Scalia, J. concurring in the judgment). Justice Scalia's comments underscore the breadth of the Court's holding.

IV.

The Police Board next appeals whether Gorman is a qualified individual with a disability under the ADA. The Police Board argues that while at the time of trial, our law clearly established that disability should be gauged without reference to corrective devices, subsequent Supreme Court decisions have required an individualized assessment of disability including consideration of available corrective devices. *See, e.g., Murphy* v. *UPS, Inc.*, 527 U.S. 516, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999); *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). It seeks a remand to litigate this issue.

This argument is well off the mark. In *Sutton*, the Court concluded that a person with severe myopia, whose vision could be corrected with eyeglasses to the point that the disability did not severely impede a major life activity was not a qualified individual. 527 U.S. at 481-83, 119 S.Ct. 2139. Gorman's wheelchair permits him some mobility, but hardly replaces his legs. Moreover, the events challenged in this lawsuit center largely on his removal from the wheelchair and placement in the back of a police van, where he had no corrective device. No corrective device — no issue. We see little need to further pursue this question.

V.

The Police Board next raises two challenges to the jury instructions. The Board asserts that the jury was not instructed as to each element of an action under sections 504 and 202, and also objects to an instruction that the Board had an obligation to provide "safe" transportation. A jury instruction must, when taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submit the issues in the case to the jury. *Horstmyer* v. *Black & Decker, (U.S.), Inc.*, 151 F.3d 765, 771 (8th Cir.1998). Where a party fails to object to an

instruction before the district court, we will review only for plain error. *Id.*

In instruction 16, the district court instructed the jury that liability would lie under the Rehabilitation Act and the ADA upon proof of all the following elements:

> **First,** that the defendants failed to provide plaintiff appropriate transportation that reasonably accommodated his disability after he was arrested, and
>
> **Second,** that as a direct result of the defendants' failure, plaintiff sustained damages.

The district court then instructed the jury in its instruction number 17 that "for purposes of Instruction No. 16, making a 'reasonable accommodation' for the plaintiff means making modifications to the defendants' practices for transporting the plaintiff after he was arrested so that he would be transported in a manner that was safe and appropriate consistent with his disability."

The Board failed to object at trial to the form of instruction 16, as given at trial. In fact, the Board agreed to its text and stated an intention to not object. We will therefore reverse only for plain error. We have previously held that in order to prevail under section 202, a plaintiff must prove that "1) he is a qualified individual with a disability; 2) he was ... denied the benefits of a public entity's services ...; and 3) that such ... denial... was by reason of his disability." *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir.1998). Such language, however, is not sacrosanct. Rather, an instruction must fairly and accurately submit the issue in light of the evidence and the law. *Horstmyer*, 151 F.3d at 771. In this case, the court's instructions resulted from lengthy negotiations between the court and the parties during which the parties agreed to drop certain elements from the instructions. Moreover, the language

used fairly captures the elements of the actions. Section 202 requires reasonable transportation modifications if necessary. The court's instruction that damages flow from a failure to reasonably accommodate a disability implicitly requires a finding of denial and disability. The instruction similarly covers the essential elements of section 504. In light of the facts of this case and the language used, we sustain the instruction given.[11]

The Board also takes issue with the district court's use of the word "safe" in instruction 17 as an incorrect statement of the law, and expresses the fear that it required the Board to insure the safety of future detainees. The district court quoted the word "safe" from our prior opinion in this case. *See Gorman*, 152 F.3d at 913. We agree with the Police Board that in *Gorman* we did not impose an obligation of providing "safe" transportation. We also, however, do not think that the district court's instruction warrants the interpretation given it by the Police Board. The instruction required transportation safe and appropriate *consistent with Gorman's disability.* This seems the essence of a reasonable accommodation — the police cannot reasonably accommodate a disabled detainee by placing him in a position where, by virtue of his disability, he is left helpless. The district court did not require the Police Board to insure Gorman against other harms, such as a crash on the way to the station or a self-imposed injury. On this reading, we approve the instruction.

VI.

The Board also challenges the district court's denial of its motion for a new trial, on the basis that the verdict was against the weight of the evidence, along with various evidentiary rulings. After reviewing the record we affirm the district court on these points.

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[11] In the future, the district court should separate out instructions under different acts and more carefully parse elements, for clarity on appeal.

We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

[File-Stamp Omitted]

IN THE UNITED STATE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JEFFREY GORMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-0475-CV-W-3
	)	
RICHARD D. EASLEY, et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE FOR NEW TRIAL

I. INTRODUCTION

A jury returned a verdict in favor of Plaintiff on his claims under the Americans with Disabilities Act (the "ADA") and the Rehabilitation Act. The jury awarded Plaintiff (1) $42,566.33 for medical expenses, (2) $342,251.00 for lost past wages, (3) $500,000.00 for lost future wages, (4) $150,000 for pain and suffering, and (5) $1.2 million in punitive damages. Pending is Defendants' Motion for judgment as a Matter of Law or in the Alternative for New Trial. The Court agrees that punitive damages are not available as a matter of law under either the

ADA or the Rehabilitation Act, so the punitive damage award is vacated. Defendants' Motion is denied in all other respects.[12]

II. DISCUSSION

A. Standards

When considering a Motion for Judgment as a Matter of Law, the Court is not permitted to consider the credibility of witnesses and must consider the evidence in the light most favorable to the prevailing party. *E.g., Gardner* v. *Buerger*, 82 F.3d 248, 251 (8th Cir. 1996). The Motion can be granted only if the evidence "point[s] unswervingly to only one reasonable conclusion." *Id.* It can also be granted, as in this case, if the law does not permit the result reached by the jury.

The Court's discretion to grant a new trial is broader than that described above. "The district court may order a new trial where it is convinced that the verdict goes against the clear weight of the evidence or where a miscarriage of justice will result. While the district court's discretion is not boundless, it

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[12] During trial, the Court indicated its uncertainty as to whether future lost wages were to be determined by the jury or the Court and invited the parties to brief the issue in their post-trial motions. They did not do so.

The Eighth Circuit has interpreted the language of Title VII of the Civil Rights Act as directing that future lost wages are to be determined by the court and not the jury. *Newhouse* v. *McCormick & Co.*, 110 F.3d 635, 640 (8th Cir. 1997). As will be discussed in Part II.B of this Order, Plaintiff's remedies in this case are not based on Title VII of the Civil Rights Act so *Newhouse* is not directly on point. Moreover, there is no statutory language governing the remedies in this case, so there is no language to interpret.

Given that the parties have not raised the issue, the Court deems it inappropriate to reach a definitive ruling on the matter. Instead, the Court will simply enter a judgment for front pay based on the jury's findings.

can rely on its own reading of the evidence in determining whether the verdict goes against the clear weight of the evidence." *Mears* v. *Nationwide Mut. Ins. Co.*, 91 F.3d 1118, 1123 (8th Cir. 1996).

B. Availability of Punitive Damages

Defendants have raised a series of arguments that attack the award of punitive damages. The Court agrees with Defendants that punitive damages were not available as a matter of law, making it unnecessary to address Defendants' remaining arguments.

Plaintiff's ADA claim was brought pursuant to 42 U.S.C. § 12132, which appears in Subchapter II of the ADA and declares that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits. . . of a public entity, or be subjected to discrimination by such entity." The ADA specifies that the remedies found in section 794a of Title 29 are to be used in cases based on this provision. 42 U.S.C. § 12133. Section 794a of Title 29 sets forth the remedies available for violations of the Rehabilitation Act, so the remedies available to Plaintiff under the two statutory schemes is [sic] co-extensive.

Section 794a contains two provisions for remedies. Section 794(a)(1) applies in employment situations, so it does not apply in this case. Section 794(a)(2) applies to persons who have been "aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance. . ." and is the provision applicable to this case. Section 794a(a)(2) declares that the applicable remedies are those found in Title VI of the Civil Rights Act of 1964, which appears at 42 U.S.C. § 2000d. Unfortunately, the trail turns cold at this point because section 2000d does not provide for a private cause of action, much less set forth the remedies

available in private lawsuits. *See Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 788 (6th Cir. 1996) (en banc).

Nonetheless, all courts to consider the issue have held that a private right of action under the Rehabilitation Act does exist. *E.g.*, *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 630 (1984) (holding that back pay is recoverable under section 504); *see also Rogers* v. *Magnet Cove Pub. Schools*, 34 F.3d 642, 643-44 (8th Cir. 1994). The difficulty comes in determining precisely what remedies are available. Plaintiff contends that punitive damages must be available because the Eighth Circuit declared in *Rodgers* that "all legal and equitable remedies are available" under both Title VI of the Civil Rights Act and the Rehabilitation Act. 34 F.3d at 644-45. This Court does not agree with Plaintiff's conclusion that the issue has been decided. Close examination of the *Rodgers*' court's discussion reveals that the full range of legal and equitable remedies is available to "make good the wrong" or, in other words, to compensate plaintiffs for their injuries. Punitive damages do not "make good the wrong" but rather punish and deter. Contrary to Plaintiff's characterization of the case, *Rodgers* did not specifically discuss punitive damages. Finally, the Eighth Circuit does not think it has settled the issue; four years after *Rodgers* was decided it observed that "[t]his court has not addressed whether punitive damages are available under Title II of the ADA and § 504 [of the Rehabilitation Act] . . . ." *Gorman* v. *Bartch*, 152 F.3d 907, 910 n.2 (8th Cir. 1998).[13]

Plaintiff also finds support in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which addressed remedies available under Title IX of the Education Amendments of 1972. Once again, contrary to Plaintiff's characterization, *Franklin* did not specifically address the availability of punitive damages. *See Moreno*, 99 F.3d at 789 & n.3. Nonetheless, *Franklin* does

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[13] Section 504 of the Rehabilitation Act is codified at 29 U.S.C. § 794 and provides the basis for Plaintiff's Rehabilitation Act claim.

provide a framework for discussion of the issue in the present case – a framework that was employed by the Sixth Circuit and led that court to conclude that punitive damages are not available under the Rehabilitation Act. The Court is persuaded by the Sixth Circuit's reasoning and elects to follow it.

Having concluded that a private right of action exists, the first task is to determine whether there is a clear indication that Congress imposed limits on the scope of relief. *Franklin*, 503 U.S. at 71; *Moreno*, 99 F.3d at 789. "In this case, as in *Franklin*, the usual sources of legislative history — contemporaneous committee reports, floor debates and the like – are of little help, the cause of action having been created by the courts and not by Congress." *Moreno*, 99 F.3d at 789. Similarly, resort to the statutory language is unhelpful because there is not statutory language addressing the issue. In order to divine Congress' intent the Court must look to the state of the law at the time the Rehabilitation Act was passed and the course of events that followed its passage and determine whether any meaningful conclusions can be made. *Franklin*, 503 U.S. at 71-73; *Moreno*, 99 F.3d at 789-91.

Following the Supreme Court's decision in *Darrone* most courts held that punitive damages were not available under either section 504 of the Rehabilitation Act or under Title VI of the Civil Rights Act (which, as noted earlier, provides the Rehabilitation Act's remedies). *See Moreno*, 99 F.3d at 789-90 (discussing cases). It was against this backdrop of judicial decisions that Congress amended the Rehabilitation Act three times.

> In 1986 Congress passed the Civil Rights Equalization Act, 42 U.S.C. § 2000d-7(a), making the states subject to § 504 – and to Title IX, Title VI, and the Age Discrimination Act – to the same extent as private parties. In the following year Congress passed the Civil Rights Restoration Act, strengthening the protections of § 504 and

the other anti-discrimination provisions by overturning *Grove City College* v. *Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984). In neither of these pieces of legislation did Congress indicate any desire to change the established understanding that punitive damages were not available under § 504.

Four years after enacting the 1987 Civil Rights Act, Congress passed the Civil Rights Act of 1991. The 1991 Act was the result of an extensive legislative compromise between President Bush and Congress. Subject to a monetary cap that could not exceed $300,000, the new act made punitive damages available – for the first time – under § 501 of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The 1991 Act did not extend the new punitive damages provision to § 504.

Id. at 790 (footnote omitted).[14]

The Court draws the same conclusion from this sequence of events as did the Sixth Circuit. Congress did not specifically declare that punitive damages were available under section 504, and the courts considering the issue held that they were not available. With this judicial landscape in place Congress amended portions of the Rehabilitation Act three times

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[14] *Moreno's* statement that the Civil Rights Act of 1991 allowed for punitive damages under the ADA is broader than it should be. The 1991 Act amended and created a new variety of statutory provisions; the provision applicable to the ADA appears in the newly-created section 1981a of Title 42, which in subsection (b) declares that punitive damages area available in cases brought under section 12117(a) of Title 42. Section 12117(a) appears in Subchapter I of the ADA and applies solely to employment cases; the 1991 Act did not affect 42 U.S.C. § 12133, which applies the enforcement mechanism for cases arising under Subchapter II of the ADA – such as the case at bar.

(including section 504 twice) and the ADA once, but at no time did Congress take steps to alter the consensus of judicial decisions. "The only inference of congressional intent that can be drawn from the three pieces of legislation is that Congress intended § 504 remedies to remain in status quo – i.e., no punitive damages." *Id.* at 791 (footnote omitted).

C. Evidence Regarding Lack of Compliance Plan

During the trial, the jury heard evidence that Defendants did not have a plan for compliance with the Rehabilitation Act, which was required by the Act and its attendant regulations. Instruction No. 21 advised the jury that it could not consider this evidence in deciding whether Plaintiff's rights had been violated, but could consider the evidence "only to help you decide whether to award plaintiff punitive damages under Instruction No. 20." Defendants suggest that the jury ignored this limitation and supports this conclusion by reasoning that there was no other way the jury could have found in Plaintiff's favor. The Court disagrees. First, the law presumes that the jury will follow the jury instructions; the fact that Plaintiff won his case does not, of its own force, prove that the presumption is unwarranted in this instance. Moreover, there was evidence that, if believed by the jury, supported the verdict in Plaintiff's favor. At the risk of omitting important details in the interest of brevity, the Court notes that there was evidence demonstrating that Plaintiff told the officers how he could be safely transported and that his instructions were not heeded. There was evidence that Plaintiff was lifted from his chair and placed on a bench in the police van; his belt was removed and used to "support" him by wrapping the belt around Plaintiff's waist and attaching it to the mesh screen behind the bench. There was evidence permitting the jury to find that this method failed to properly support Plaintiff and that he was unable to maintain his balance. Plaintiff's inability to support himself, coupled with the force exerted upon the belt, caused the belt to break. Plaintiff was then left to literally bounce around in the van while he was

transported. In short, the Court holds that there was sufficient evidence to support the jury's verdict and there is no basis for concluding that the jury disobeyed Instruction No. 21.[15]

D. Evidentiary Issues

Defendants revisit a variety of evidentiary issues. These issues involve evidence of Plaintiff's prior history of intoxication the circumstances of the 1988 automobile accident that originally paralyzed Plaintiff. The Court will not delve into these matters in great detail, as the matters have been discussed in the Court's Order in Limine and on the record during trial. Briefly stated, evidence of intoxication at times other than the incident in question is not "habit" evidence as that concept is commonly understood, nor is it proper evidence of character. To the extent that the fact a person was intoxicated at some time unrelated to the present case bears on this character, the Court concludes that the inference is unduly prejudicial and is excludable under Rule 403 of the Federal Rules of Evidence. Finally, the court does not believe that intoxication at times other than the incident in question bears on credibility. Intoxication bears on credibility insofar as it bears on a witness' ability to perceive events, and Defendants were allowed to introduce evidence that Plaintiff was intoxicated on this occasion. The fact that he was intoxicated at times in the past was irrelevant.

Similarly, the circumstances of the 1988 accident – namely, that it resulted from his attempt to flee pursuing police officers – is also inappropriate character evidence and the probative value of the evidence is outweighed by the risk of improper prejudice. It also does not bear on credibility. Defendants seem to suggest that the fact he was fleeing from the

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[15] Because the award of punitive damages is vacated on other legal grounds, there is no need to consider whether evidence about the lack of a compliance plan was properly admissible on this issue.

police indicates bias on Plaintiff's part, but the Court believes that the evidence Defendants wished to introduce posed a substantial risk that the jury could consider the fact that Plaintiff had previously fled from the police in evaluating his veracity instead of considering the more subtle argument that Plaintiff blamed the police for his original paralyzing injury and therefore was biased against them. This would have been an improper basis for impeaching Plaintiff, so the risk of unfair prejudice outweighed the probative value of the evidence.

In their Motion Defendants identified another evidentiary issue they wanted the Court to consider: the prohibition on evidence that Plaintiff settled other claims with non-police officers. These claims related to a bar's decision to remove Plaintiff from his premises and involves events leading to his arrest. The issue is unreviewable at this juncture because Defendants' Suggestions in Support of their Motion (Doc. #181) makes no mention of the issue so the Court has not been presented with legal support for Defendant's position. The Court permitted Defendant to introduce evidence that the bar's personnel were responsible for Plaintiff's injuries, *see* April 2, 1999 Order in Limine, but the admissibility of Plaintiff's settlement on those claims is unclear and unestablished.

E. Instructional Error

Defendants contend the verdict director (Instruction No. 16) incorrectly stated his law in that it did not ask the jury to decide whether Plaintiff was a qualified individual with a disability. There was no doubt that Plaintiff was disabled within the meaning of the act, he was paralyzed and confined to a wheelchair. Cf. *Sutton* v. *United Air Lines, Inc.*, 119 S. Ct. 2139, 2149 (1999) ("individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation

on their ability to walk or run.").[16] The issue of whether he was a qualified person with a disability was answered by the Eighth Circuit in the fist appeal in this case. *Gorman*, 152 F.3d at 912-13. Finally, the Court's notes reflect that after the noon recess on the third day of trial (April 7, 1999) Defendants' counsel agreed that the issue did not need to be included in the jury instructions.

Defendants also contend that the use of both Instruction No. 16 and Instruction No. 17 was confusing and inconsistent. The Court disagrees. Instruction No. 16 contained, as the first element, "that the defendants failed to provide plaintiff appropriate accommodation that reasonably accommodated his disability after he was arrested." Instruction No. 17 states as follows:

> For purposes of Instruction No. 16, making a "reasonable accommodation" for the plaintiff means making modifications to the defendants' practices for transporting the plaintiff after he was arrested so that he would be transported in a manner that was safe and appropriate consistent with his disability.
>
> In deciding whether any accommodations were reasonable, you should consider all the facts and circumstances surrounding the events of May 31, 1992.

[16] This also addresses Defendants' suggestion, raised in their Supplemented and Renewed Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial, that Plaintiff was not a "disabled" within the meaning of the ADA or the Rehabilitation Act. There was no serious dispute on this issue at trial.

Instruction No. 17 is a definitional instruction; the fact that it uses words different than those used in Instruction No. 16 is to be expected and is not fatal.[17]

Defendants' remaining arguments about the content of Instruction No. 16 were addressed on the record during trial and need not be addressed again. In this regard, the Court wishes to briefly address one issue; namely, the failure to specifically instruct the jury that it could find for Plaintiff only if it found the Defendants discriminated against him based on his disability. The Court's notes from the discussion held on the fourth day of trial (April 8, 1999) reflect that the discussion about the director focused upon Plaintiff's ability to elect to pursue a claim based on either (1) discrimination based on handicap or (2) failure to accommodate his handicap. It was agreed that Plaintiff could pursue either legal theory, and it was quite clear that Plaintiff elected the latter course. Once Plaintiff made this election the conversation focused on the proper manner for instructing the jury about Defendants' obligation to provide reasonable accommodation, but at no time did Defendants suggest that the proper method required discrimination-type language. Thus, the Court does believe that (1) Defendants are incorrect as a matter of law based on Plaintiff's chosen legal theory, and (2) Defendants did not raise the issue.

F. Sufficiency of the Evidence

Defendants argue that there was insufficient evidence to support the verdict, but offer no real explanations as to why this conclusion should be credited. Other than speculating on the effect of the evidence about the lack of a compliance plan (see Part II.C, above), Defendants offer no arguments in support.

[17] The Court notes that Defendant has not argued that Instruction No. 17 is an incorrect statement of law.

The Court has already discussed the fact that there was sufficient evidence to support the jury's findings of liability.

The Motion also identifies the lack of evidence to support the damage awards as an issue Defendants wish to raise. However, Defendants' Suggestions in Support (Doc. #181) fails to raise any arguments relevant to the damage calculation. Consequently, Defendants have not presented anything for the Court to review.

III. CONCLUSION

For the foregoing reasons, Defendant's Renewed Motion for Judgment as a Matter of Law, or, in the Alternative for New Trial is granted in part and denied in part. The award of punitive damages is vacated; the Motion is denied in all other respects.

IT IS SO ORDERED.

s/Ortrie D. Smith

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: 10/28/99

APPENDIX C

[File-Stamp Omitted]

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JEFFREY GORMAN, Plaintiff,

v.

RICHARD EASLEY, et al., Defendants.

** 2nd AMENDED **
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95-0475-CV-W-3

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on the discrimination claim of plaintiff Jeffrey Gorman against defendants in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri as submitted in Instruction No. 16, we find in favor of Plaintiff Jeffrey Gorman. We find Plaintiff Jeffrey Gorman's damages as defined in Instructio[n] No. 18 to be: $1,034,817.33. We, the Jury, have awarded damages for each of the categories listed in Instruction No. 18 as set forth: $43,566. for wages; $150,000.00 for physical pain, suffering, humiliation, inconvenience or emotional anguish.

Defendant's Renewed Motion for Judgment as a Matter of Law, or, in the Alternative For New Trial is granted in part and

denied in part. The award of punitive damages is vacated; the Motion is denied in all other respects.

Plaintiff's Motion for an award of attorney fees and costs is granted in part and denied in part. Defendants are ordered to pay Plaintiff's attorney fees in the amount of $278,292.00 and Plaintiff's costs in the amount of $11,621.40. In accordance with the parties' agreement on this matter, the award shall accrue interest at the post-judgment rate. *See* 28 U.S.C. § 1961.

November 5, 1999 — Patricia L. Brune

Date — *Clerk*

Entered on Nov 8 1999 — s/ E. Wells

(By) Deputy Clerk

APPENDIX D

United States Court of Appeals
for the Eighth Circuit

No. 97-4323

Jeffrey Gorman, Plaintiff-Appellant,

v.

Floyd Bartch; Steven Bishop, Chief, Kansas City Missouri Police Department; Emanuel Cleaver II; John Dillingham; Jack Headley; Jacqueline Paul; Bailus Tate; Donna Boley; Neil Becker; Stacey Daniels, Dr.; James F. Ralls, Jr., Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: May 18, 1998

Decided: August 20, 1998

Before BEAM, LOKEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Jeffrey Gorman, a paraplegic who uses a wheelchair, was injured while being transported after his arrest by Kansas City police officers. He brought this action against the members of the Kansas City Board of Police Commissioners, the chief of police, and the officer who drove the transport vehicle, claiming discrimination based on his disability in violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).[1] The district court granted summary judgment to the defendants, and Gorman appeals from the judgment. We affirm in part and reverse in part.

I.

Each side characterizes the facts in the record quite differently, but on our de novo review of the grant of summary judgment, we state them in the light most favorable to Gorman, the non-moving party. *Gerdes* v. *Swift-Eckrich, Inc.*, 125 F.3d 634, 637 (8th Cir.1997). A severe spinal cord injury requires Gorman to use a wheelchair, and in the early hours of May 31, 1992 he became involved in a disagreement at a Kansas City bar known as Guitars and Cadillacs. When he and a friend began descending the steps to the dance floor, a bar employee told him he could not go down onto the dance floor. Gorman protested that he was entitled to go there, but the employee told him "you're out of here" and began to pull his wheelchair up the steps. Gorman was evicted from the bar. When he demanded to be readmitted, employees at the door refused. Gorman then approached two police officers to tell them what had happened and to request their help in getting back into the bar. He began to argue with them, and they eventually arrested him for

[1] He also alleged negligence, but his negligence claims were dismissed by the district court and he has not discussed them in his briefing or argument on appeal. They are therefore considered abandoned. *Jasperson* v. *Purolator Courier Co.*, 765 F.2d 736, 740-41 (8th Cir.1985).

trespassing and called for transportation to take him to the police station.

In response to the call officer Neil Becker arrived with a patrol wagon that was not equipped with a wheelchair lift or wheelchair restraints. Gorman told the police that the van was not properly equipped for him to ride in it, and that due to his use of a urine bag it would be necessary for him to go to the bathroom before he was transported. The officers lifted Gorman from his chair and placed him on a bench inside the van. Gorman states that they complied with his instructions on how to lift him from his chair, but not with his requests that he be allowed to go to the bathroom prior to transport or that they place the seat cushion from his wheelchair underneath him to help support his legs. Because of his paraplegia Gorman was not independently able to maintain himself upright on the bench, and the police tied him with his belt to a mesh wall behind the bench and also fastened a seatbelt around him. During the drive to the station the belts came loose, and Gorman fell to the floor. The fall injured his shoulders and back severely enough to require surgery and also broke his urine bag, leaving him soaked in his own urine.

Gorman filed this action, alleging violation of his rights under the ADA and the Rehabilitation Act and negligence in his handling. Gorman sued police chief Steven Bishop; commissioners Emmanuel Cleaver, John Dillingham, Jack Headley, Jacqueline Paul, and Bailus Tate; and police officer Neil Becker. Donna Boley, Stacy Daniels, and James Ralls were added when they replaced Paul, Dillingham, and Tate as members of the board of police commissioners, as was Floyd Bartch when he succeeded Bishop as chief of police. Gorman alleged that the board members and the chief failed to provide a proper transportation vehicle to accommodate his condition, to modify department policies and procedures dealing with arrest and transportation to accommodate individuals with spinal cord injuries, and to institute proper training for Kansas

City police officers on how to handle such arrestees. He claimed that the manner of his post-arrest handling and transportation evidenced unlawful discrimination by all the defendants, including Becker who drove the police van that took him to the station. His complaint sought compensatory damages for physical and mental injuries, punitive damages, injunctive relief compelling the defendants to comply with the statutes, and attorney fees and costs.

The defendants filed several motions in the district court, including motions for summary judgment, and the parties submitted affidavits and deposition testimony from Gorman, several defendants, and other witnesses. The district court disposed of the issues on summary judgment in two separate orders. The first order dismissed all the negligence claims;[2] dismissed all claims against the defendants in their individual capacities on the basis of qualified immunity; and dismissed all other claims against former commissioners Dillingham, Paul, and Tate, as well as former police chief Bishop.[3] The only claims which remained after the first order were therefore the statutory claims against the remaining defendants in their

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[2] The court held the negligence claims failed under Missouri law. It reasoned that the defendants in their individual capacities were engaged in discretionary acts and that the official capacity claims were barred by sovereign immunity because they did not fit statutory exceptions for negligent operation of a motor vehicle in the course of official duty or for maintaining dangerous conditions on public property. *See* Mo.Rev.Stat. § 537.600.

It is not clear from the complaint whether the claim for punitive damages was based only on negligence. This court has not addressed whether punitive damages are available under Title II of the ADA and § 504, but the Sixth Circuit has ruled they are not. *See Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir.1996).

[3] The order specified that Floyd Bartch would be substituted for Bishop as to any official capacity claims.

official capacities. The second order concluded that the two federal statutes did not cover Gorman's claims because he did not fit the ADA definition of a "qualified individual with a disability." Such a qualified individual must meet "the essential eligibility requirements for the receipt of services" of the public entity, and the court construed this statutory language to mean services voluntarily sought, which would not include those incident to an arrest. The court also reasoned that Congress had not shown it intended to extend the statute to a core state function such as police work, citing in support *Torcasio* v. *Murray*, 57 F.3d 1340 (4th Cir.1995) (qualified immunity for state prison officials sued under the ADA). A final judgment was not entered until after Gorman's initial attempt to appeal,[4] and the court's order for judgment added a citation to *Aswegan* v. *Bruhl*, 113 F.3d 109 (8th Cir.1997), *cert denied sub nom Aswegan* v. *Emmett*, 522 U.S. 956, 118 S.Ct. 383, 139 L.Ed.2d 299 (1997) (leaving open the question of whether the ADA applied to state prisons, but rejecting the claim that an individual cable television hookup in an infirmary cell was a public service to which the plaintiff was entitled where cable television was available in the infirmary recreation area adjacent to his cell).

On appeal Gorman argues that he is a qualified individual with a disability, that the statutes do not distinguish between public services that are voluntarily sought and those that are not, that transporting arrestees is a program or activity covered by the ADA and the Rehabilitation Act, that he was discriminated against by not receiving transportation that was safe in light of his disability, and that the defendants are not entitled to qualified immunity since the applicable law was clearly established at the time of his arrest and transportation.[5]

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[4] *See Gorman* v. *Bartch*, 123 F.3d 1126 (8th Cir.1997).

[5] The United States was initially permitted to intervene in the district court because of a constitutional challenge to Title II as void for

The police defendants argue in response that Gorman is not a qualified individual with a disability since he did not voluntarily seek police transportation, that such transportation is not a service or activity covered by the statutes, that Gorman was not discriminated against based on his disability, and that they are entitled to qualified immunity.

The task before this court then is essentially twofold: to determine (1) whether Gorman has presented claims cognizable under the ADA and the Rehabilitation Act, and (2) whether the defendants sued in their individual capacities are entitled to qualified immunity.

II.

Analysis of whether Gorman's allegations can be pursued under Title II of the ADA and § 504 of the Rehabilitation Act must begin with the language of the statutes themselves, *Watt* v. *Alaska*, 451 U.S. 259, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981), and their plain language must be given effect. *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992).

The Rehabilitation Act became effective in 1973, and § 504 of the act provides that "[n]o otherwise qualified individual with a disability" shall "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The reach of this statutory language is demonstrated by the definition of "program or

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vagueness, and it has filed an amicus brief on this appeal which argues that Title II of the ADA and § 504 of the Rehabilitation Act apply to all operations of a police department and to the type of allegations raised by Gorman. The district court's ruling upholding the constitutionality of the statute has not been appealed.

activity" to include "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b). To prevail on a claim under § 504, a plaintiff must demonstrate that: (1) he is a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a public entity which receives federal funds,[6] and (3) he was discriminated against based on his disability. 29 U.S.C. § 794(a); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir.1998). Defendants may demonstrate as an affirmative defense that a requested accommodation would constitute an undue burden. 29 U.S.C. § 794a(a)(1); *Barth* v. *Gelb*, 2 F.3d 1180, 1183 (D.C.Cir.1993). Plaintiffs who prevail on Rehabilitation Act claims are entitled to the full spectrum of legal and equitable remedies needed to redress their injuries. *Lue* v. *Moore*, 43 F.3d 1203, 1205 (8th Cir.1994); *Rodgers* v. *Magnet Cove Public Schools*, 34 F.3d 642, 644 (8th Cir.1994).

The ADA consists of three titles addressing discrimination against the disabled in different contexts. Title I prohibits employment discrimination, 42 U.S.C. § 12112, Title II prohibits discrimination in the services of public entities, 42 U.S.C. § 12132, and Title III prohibits discrimination by public accommodations involved in interstate commerce such as hotels, restaurants, and privately operated transportation services, 42 U.S.C. §§ 12182, 12184. Title II took effect in January of 1992 and provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is broadly defined as any person who "meets the essential eligibility requirements for the

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[6] No argument has been raised in this case that the Kansas City police department does not receive federal funds, and Bishop testified in his deposition that it did.

receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The term "public entity" is defined to be "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1).

The ADA has no federal funding requirement, but it is otherwise similar in substance to the Rehabilitation Act, and "cases interpreting either are applicable and interchangeable." *Allison* v. *Department of Corrections*, 94 F.3d 494, 497 (8th Cir.1996). The statute itself states that "[t]he remedies, procedures, and rights" under § 504 are also available under Title II. 42 U.S.C. § 12133; *see also Layton*, 143 F.3d at 472; *Hoekstra* v. *Independent School Dist. No. 283*, 103 F.3d 624, 626-27 (8th Cir.1996). A plaintiff under Title II of the ADA must therefore similarly show that he is a qualified individual with a disability denied participation in, or the benefits of, the services, programs, or activities of a public entity because of his disability. *Layton*, 143 F.3d at 472. The defendants may also raise as an affirmative defense that the requested accommodation of the plaintiff's disability would constitute an undue burden, requiring "a fundamental alteration in the nature of a service, program, or activity or in undue financial or administrative burdens." *See* 28 C.F.R. § 35.150(a)(3).

Our task in considering whether Gorman's allegations come under the ambit of the federal statutes has been made easier by the Supreme Court's unanimous decision on June 15 in *Pennsylvania Department of Corrections* v. *Yeskey*, 524U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998). In applying Title II of the ADA to state prisons and prison services, Justice Scalia emphasized the broad language used by Congress and its choice not to include exceptions. *Id.* 524 U.S. at ----, 118 S.Ct. at 1954. State prisons "fall squarely within the statutory definition of 'public entity'" since § 12131(1)(B) defines public entity as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.*

524 U.S. at ----, 118 S.Ct. at 1954-55. The Court categorically rejected the argument that the statutory prohibition against excluding a qualified individual with a disability from participating in or receiving the "benefits of the services, programs, or activities of a public entity" does not apply to prison services because they do not fit the common understanding of "benefits" or "services," for "[t]he text of the ADA provides no basis for distinguishing these programs, services, and activities." *Id.* 524 U.S. at ----, 118 S.Ct. at 1955.

Application of *Yeskey* to the claims in this case shows that they also fit under the ADA. A local police department falls "squarely within the statutory definition of 'public entity,'" *Id.* 524 U.S. at ----, 118 S.Ct. at 1954, just like a state prison. The fact that Gorman may not have "volunteered" to be arrested does not mean he was not eligible to receive transportation service to the police station. Covered programs or services do not need to be voluntary, for "the words [of the statute] do not connote voluntariness." *Id.* 524 U.S. at ----, 118 S.Ct. at 1955. A qualified individual may participate in a service on either a voluntary or a mandatory basis, as illustrated by Justice Scalia's example of a drug addict required to participate in a treatment program. *Id.* Transportation of an arrestee to the station house is thus a service of the police within the meaning of the ADA. The fact that the statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* 524 U.S. at ----, 118 S.Ct. at 1956 (internal citations omitted). It was therefore error to conclude that Gorman was not a "qualified individual with a disability" who "meets the essential eligibility requirements for the receipt of services."[7] 42 U.S.C. § 12131.

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[7] *Yeskey* also undercuts the point made by the district court in reliance on *Torcasio* that the ADA does not indicate that it applies to core state functions such as prisons. Justice Scalia emphasized that the statutory language "plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." *Yeskey*, 524 U.S. at ----,

The stated purpose of the ADA also demonstrates its applicability to transportation of arrestees. In the statement of findings and purpose at the beginning of the statute, Congress noted that "discrimination against individuals with disabilities persists in such critical areas as ... transportation ... institutionalization ... and access to public services" and that disabled individuals face the discriminatory effects of "failure to make modifications to existing facilities and practices." 42 U.S.C. 12101(a). Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b).

The regulations promulgated to guide implementation of the statute are also instructive. The Department of Justice specified that the statutory term "program" includes "the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., a police department or department of corrections." 28 C.F.R. § 42.540. The regulations also indicate that "benefit" includes "provision of services, financial aid, or disposition (i.e., handling, decision, sentencing, confinement, or other prescription of conduct)." *Id.* The commentary also made clear that "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities." 28 C.F.R. § 35, App. A, Subpart B.

Gorman's allegations that the defendants denied him the benefit of post-arrest transportation appropriate in light of his disability fall within the framework of both Title II of the ADA and § 504 of the Rehabilitation Act. The defendants are representatives of the Kansas City police establishment, a department of local government and a public entity. Arrestee

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118 S.Ct. at 1954 (emphasis in original).

transportation is a program or service of the department as shown by record evidence that vehicles are dispatched by the department to transport arrestees. The statutes must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting discrimination. *Innovative Health Systems* v. *City of White Plains*, 117 F.3d 37, 44-45 (2nd Cir.1997). The "benefit" Gorman sought in this case was to be handled and transported in a safe and appropriate manner consistent with his disability. *See* 28 C.F.R. § 35.130(b)(1) (public entity may not provide services in a manner denying disabled individuals equal benefit of the service). His allegations are different from cases in which plaintiffs sought unique benefits or services. *See e.g., Aswegan*, 113 F.3d at 110; *Lue* v. *Moore*, 43 F.3d 1203, 1206 (8th Cir.1994) (Rehabilitation Act did not require creation of new prison vocational training program).

Because Gorman's allegations pass the threshold required to bring a case under the ADA and the Rehabilitation Act, the district court's ruling to the contrary must be reversed and the case remanded for further proceedings. It remains to be determined whether Gorman can prove he was discriminated against or denied a benefit or service because of his disability or whether the defendants can show they made reasonable accommodations of his disability or if further accommodation would have been an undue burden. 29 U.S.C. § 794a(a)(1); 42 U.S.C. § 12133. The facts of what actually occurred on the night of the arrest are contested. The defendants dispute Gorman's version. They have produced evidence that he was intoxicated, that he repeatedly wheeled his chair into the street and yelled profanities, that he did not tell the police how to transport him safely, and that he fell to the floor of the van because he released his seatbelt. We resolve only the threshold issue at this time, and we are not in a position to assess what the evidence shows about relevant details of Gorman's condition or about the information and options available to the police. The factual record will need to be further developed on remand

before the remaining issues of potential liability and possible relief are determined.

III.

Gorman also challenges the district court's determination that the defendants are entitled to qualified immunity in their individual capacities. The district court granted summary judgment on the claims against the defendants in their individual capacities based on its conclusion that the applicability of Title II of the ADA and § 504 of the Rehabilitation Act to the transportation of an arrestee was not clearly established at the time of Gorman's arrest. Gorman concedes on appeal that defendants Bartch, Boley, Daniels, and Ralls are not subject to liability in their individual capacities because they assumed their positions after the events giving rise to his claims and they were therefore sued only in their official capacities. He argues that the district court erred in dismissing the individual capacity claims against the remaining defendants, however, because the applicability of the statutes to his transportation was clearly established. The defendants argue in response that their conduct did not violate clearly established rights under the statutes.[8] We review de novo the decision granting qualified immunity. *Rowe* v. *Lamb*, 130 F.3d 812, 814 (8th Cir.1997).

Claims against government actors in their individual capacities differ from those in their official capacities as to the type of conduct that is actionable and as to the type of defense that is available. *See Hafer* v. *Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Claims against individuals in their official capacities are equivalent to claims against the entity for

[8] Since the defendants did not appeal the district court's conclusion that they were sued in both their official and individual capacities, they have waived any argument about the correctness of that determination. *In re Sherman*, 67 F.3d 1348, 1357 n. 10 (8th Cir.1995).

which they work; they require proof that a policy or custom of the entity violated the plaintiff's rights, and the only type of immunity available is one belonging to the entity itself. *Id.*, 502 U.S. at 24-27, 112 S.Ct. at 361-62 (1991). Personal capacity claims, on the other hand, are those which allege personal liability for individual actions by officials in the course of their duties; these claims do not require proof of any policy and qualified immunity may be raised as a defense. *Id.*, 502 U.S. at 25-27, 112 S.Ct. at 362.

The defense of qualified immunity gives government officials engaged in discretionary activities immunity from liability unless their conduct violates "clearly established statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The availability of the defense should ordinarily be resolved at the earliest opportunity to avoid unnecessary cost and excessive interference with government operations. *Id.* Whether the controlling legal principle has been clearly established is not to be determined at the most general level of legal abstraction, but by consideration of whether a reasonable official would have known the conduct in question was unlawful in light of information available at the time. *Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987).

The factual record before the court on the summary judgment motion based on qualified immunity consisted of affidavits and portions of depositions. Commissioner Dillingham testified in his deposition that shortly after the ADA was passed, the commissioners were notified by a police department representative that the law had been enacted and that it might apply to the operations of the department. He did not recall any formal discussion of the impact of the law on department operations, however, or of any perceived need for an official policy to ensure compliance with the law or information about how other police departments were responding. Dillingham testified that the commissioners relied on the

department to develop procedures to comply with the new law and that board minutes would have disclosed if there had been discussion of the ADA or any policy under it. Commissioner Headley testified that when the board was informed of a new law by its legal department, it would commonly wait for appropriate procedures to be developed by the police department; the board's role was to review and approve policy. Suzanne Owen, an assistant to the board, reviewed minutes of the meetings prior to Gorman's arrest and found no discussion about the design or provision of patrol wagons.

Chief Steven Bishop stated in his deposition that he had been aware of the existence of the ADA, but that he was not familiar with the Rehabilitation Act and that he did not know the effective date of either statute. While department officials had attended some training sessions on the ADA, he had delegated responsibility for developing department procedures to comply with the law to a deputy chief and he was not aware of any training that had been conducted for rank and file police officers. Major Dean Kelly, the director of personnel, testified that in September of 1991 a committee had been created which made a series of recommendations on how to achieve compliance with the ADA. These recommendations dealt primarily with reconfiguring department job descriptions and other employment issues, however, and Kelly was not aware of any dealing with arrest and transportation procedures. Commander Thomas Daly of the planning and research division testified that the department had conducted training on how to handle wheelchairs, but that he did not recall when. Officers are trained to handle arrestees "in whatever state we find them," but Daly was not aware of any specific written policies on handling arrestees in wheelchairs or any meetings discussing the applicability of the ADA to arrest and transportation. Pete Richardson, manager of fleet operations for the department, testified that none of its vehicles had been equipped to handle wheelchairs at the time of Gorman's arrest, but that they have all since been fitted with "hold downs" which permit a

wheelchair to be transported without removing the arrestee from the chair.

Officer Neil Becker testified in his deposition that he had been a patrol officer with the department for over twenty years and that he had received no special training to operate a patrol wagon. Any officer could be assigned to drive one during a particular shift. He recalled that he and the other officers on the scene asked Gorman some questions about the logistics of transporting him, but he did not remember exactly what Gorman said he needed or whether he asked to have his seat cushion under him for support. He did not recall receiving any training prior to Gorman's arrest on compliance with the ADA or handling arrestees with spinal cord injuries and was not aware of any department policies or procedures for the handling of arrestees with disabilities.

At the time of Gorman's arrest in May of 1992, Title II of the ADA had only been in effect for some four months. Despite the clear language of the statute, there was uncertainty about the extent of its coverage. There were no cases addressing its possible application to government agencies like police departments or to the transportation of arrestees. Although there were some cases applying the Rehabilitation Act to prisons, there were none dealing with facts similar to those alleged by Gorman. *See Harris* v. *Thigpen*, 941 F.2d 1495 (11th Cir.1991) (HIV positive inmates seeking access to prison programs); *Bonner* v. *Lewis*, 857 F.2d 559 (9th Cir.1988) (prisoner's claim for qualified interpreter in disciplinary hearings). In the intervening years until the Supreme Court decided *Yeskey*, courts divided on the applicability of the ADA and Rehabilitation Act to state prisons. Compare *Yeskey* v. *Commonwealth of Pennsylvania Dept. of Corrections*, 118 F.3d 168 (3rd Cir.1997) (participation in prison boot camp program covered), *Crawford* v. *Indiana Dept. of Corrections*, 115 F.3d 481 (7th Cir.1997) (blind inmate's access to prison education and recreation programs covered), *with White* v. *Colorado*, 82

F.3d 364 (10th Cir.1996) (denial of surgery for prisoner's preexisting injury not covered), *Torcasio*, 57 F.3d 1340 (4th Cir.1995) (application to obese prisoner's claim for larger cell and alternative recreation not clearly established). Moreover, much of the early attention to the ADA was focused on employment and physical access issues.

Under the circumstances it cannot be said that reasonable police officials in May of 1992 would have known that the actions alleged against the individual defendants in respect to the transportation of a disabled arrestee were subject to, and in violation of, Title II of the ADA or § 504 of the Rehabilitation Act. The defendants are therefore entitled to qualified immunity in their individual capacities, and we affirm that ruling by the district court.

IV.

The district court ultimately dismissed all of Gorman's claims for damages and injunctive relief by concluding that his claims against the defendants in their official capacities could not go forward since the statutes did not apply to arrestee transportation by a police department. As already discussed, Gorman's complaint passes the statutory threshold under *Yeskey* and the claims against the defendants in their official capacities must be remanded for further development. It remains to be seen whether he can show he was discriminated against or denied a benefit because of his disability or that the defendants had a policy or custom that violated his rights under the ADA or the Rehabilitation Act, and the defendants can also raise issues of reasonable accommodation and undue burden.

The judgment dismissing all claims is vacated, and the conclusion of the district court that the ADA and the Rehabilitation Act do not cover Gorman's allegations is reversed. We affirm the dismissal of the claims against the defendants in their individual capacities on the basis of qualified

immunity, and remand the official capacity claims against Bartch, Cleaver, Headley, Boley, Daniels, Ralls, and Becker[9] for further proceedings not inconsistent with this opinion.

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[9] Officer Becker is not alleged to have had any policy making function, and it is unclear what liability he might have in his official capacity, but the district court indicated that he was also sued in this capacity, and he has not appealed this determination.

APPENDIX E

United States Court of Appeals
for the Eighth Circuit

No. 00-1029/00-1030

Jeffrey GORMAN, Appellant/Cross-appellee,

v.

Richard EASLEY, et al., Appellees/Cross-appellants.

Order Denying Petition for Rehearing
and Rehearing En Banc

August 20, 2001

The petition for rehearing en banc is denied. Judge Bowman and Judge Loken would grant the petition.

The petition for rehearing by the panel is also denied.

APPENDIX F

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), as amended, provides in pertinent part:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * * .

Section 505 of the Rehabilitation Act, as amended in 1978, 29 U.S.C. § 794a, provides in relevant part (29 U.S.C. § 794a(a)(2)):

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, provides in full:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 203 of the ADA, 42 U.S.C. § 12133, provides in full:

> The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and

rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides in full:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * * .

The Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides in pertinent part:

> (a) Right of recovery
>
> * * *
>
> (2) Disability
>
> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged

> in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
>
> * * *
>
> (b) Compensatory and punitive damages
>
> (1) Determination of punitive damages
>
> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
>
> * * *
>
> (3) Limitations
>
> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses,

emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Supreme Court, U.S.
FILED
DEC 19 2001
CLERK

No. 01-682

In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, Jeffrey Gorman, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's decision in this case.

STATEMENT

After being asked to leave a Kansas City nightclub because he was in a wheelchair, Jeffrey Gorman, who suffers from paraplegia, exited as requested. He then solicited assistance from uniformed police officers of the Kansas City, Missouri Police Department (KCMOPD) in correcting the acts of discrimination against him. The officers, working off-duty for the nightclub, ignored Gorman's efforts to explain the discriminatory acts which had occurred and placed him under arrest for trespassing. The officers requested a KCMOPD police van for transport. When it arrived, Gorman told officers that he could not be safely transported in the van because of his disability. Again ignoring Gorman, officers removed him from his wheelchair, propped him on a bench, and tied him to the van wall. During transport, Gorman fell from the bench and was injured. Petitioners' Petition, Appendix, 36a-37a.

Those injuries included shoulder injuries that required surgery and back injuries for which there are no surgical options. Appellant's Supp. Appendix, Eighth Circuit, 23, 26-29. He also suffered a bladder infection for which he was treated with antibiotics. Appellant's

Appendix, Eighth Circuit, 108. He has suffered and will continue to suffer extensive pain from the back injuries. District Court trial transcript, 171. His shoulder and back injuries make it difficult for him to sit and restrict his use of a wheelchair, limiting significantly his mobility, his ability to work, and his future earnings. Appellant's Supp. Appendix, Eighth Circuit, 30; District Court trial transcript, 437-440. He will suffer pain from his back injuries throughout his life and will require ongoing pain management treatment. District Court trial transcript, 171.

Gorman sued the transporting officer of the KCMOPD and the Board of Police Commissioners of Kansas City, Missouri, for their failure to make accommodations during his arrest and transport as required by § 504 of the Rehabilitation Act (§ 504), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. § 12132. Gorman sought damages for injuries he suffered as a result of the Petitioners' failure to make accommodations necessary because of his disability.

At trial, Petitioners stipulated that the KCMOPD had been accepting Federal funds contingent on compliance with regulations implementing § 504 and had signed affidavits each year from 1981 to 1995 (three years after Gorman was injured) stating the KCMOPD was in compliance when, in fact, it was not in compliance. Additionally, the Petitioners stipulated they had never instituted policies regarding transportation and detention of persons with a disability, had never trained officers regarding the transportation and detention of persons with a disability, and had no procedures for accommodating arrested persons with disabilities as required by those

regulations. Stipulation, Appellant's Appendix, Eighth Circuit, 135-136. KCMOPD officers testified that they did not know how to transport Gorman and were unable to transport him appropriately. Appellant's Appendix, Eighth Circuit, 117-123, 128-130, 133.

REASONS THE PETITION SHOULD BE DENIED

I. This case is not properly reviewable by the Supreme Court because the litigation below is interlocutory with regard to the issue on which the Petitioners seek review.

A final judgment regarding punitive damages has not been issued in this case. The Eighth Circuit remanded this case to the district court for consideration of whether punitive damages are appropriate in this specific case. *See* Petitioners' Petition, Appendix, 16a. The district court has not yet reviewed the case as ordered by the Eighth Circuit. If the district court determines punitive damages are not appropriate, the question presented will not be at issue in this case. Additionally, the Eighth Circuit said that it had an obligation to review the district court's finding. *Id.*

In *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the petition for certiorari was denied because the litigation below had not come to final judgment. *Virginia Military Institute* is like this case in that the court of appeals vacated the judgment in favor of the petitioners and remanded the case to the district court for determination of an appropriate remedy. *Id.* In *Virginia Military Institute*, Justice Scalia, in denying the petition,

said: "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction". *Id.*; *see also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (describing "the Court's normal practice of denying interlocutory review."); *see generally* R. Stern, et al., *Supreme Court Practice* 195-96 (7th ed. 1993).

In sum, the district court should be allowed to make its determination as to whether the evidence in the case supports the award of punitive damages, and the Eighth Circuit should be allowed to review the decision of the district court. If punitive damages are not granted, there may be no controversy for this Court to decide. This Court should not review the case until the issue is fully resolved and there is a final judgment below.

II. Petitioners misstate and exaggerate the conflict among the circuits.

The Petitioners attempt to show that there is a conflict among the circuits on whether punitive damages are allowable under § 504 or Title II. At most there is a one-one split between the Eighth Circuit in this case and the Sixth Circuit.

The Petitioners argue that there is a conflict among the circuits based on four cases. They contend that this case (Eighth Circuit) and *Pandazides v. Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994) allow punitive damages and that *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) and *Doe v. County of Centre*, 242 F.3d 437 (3d Cir. 2001) do not allow them.

Doe v. County of Centre does not evidence a circuit split. *Doe* held that a municipality was not liable for punitive damages under § 504 and Title II under the rationale of this Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). *Doe*, 242 F.3d at 457-458. Unlike this case, *Doe* did not consider whether punitive damages are available generally under § 504 or Title II. Municipal liability for punitive damages under § 504 or Title II was never addressed at any point in this case. Further, as explained below at p. 6, Petitioners have waived any issue regarding Petitioners not being liable for punitive damages because the Board of Police Commissioners is a municipal entity, and therefore, a conflict in the circuits can not be premised on that issue.

In *Pandazides*, the Fourth Circuit stated in dicta that punitive damages can be awarded under § 504. In *Pandazides*, an employment case against a state defendant, the court only held that because compensatory damages could be awarded under § 504 claims the plaintiff had a right to a jury trial. *Pandazides*, 13 F.3d at 829-832. The dicta about punitive damages was not necessary for a decision in the case. Because the Fourth Circuit did not actually rule on the award of punitive damages under § 504, that case does not support review.

The only other case cited by Petitioners in arguing there is a split is *Moreno*, an employment case against a private employer. *Moreno*, 99 F.3d at 784. *Moreno*, by itself, does not present the depth of a split required for this Court to grant a petition for certiorari. *See* R. Stern, et al., *Supreme Court Practice* 171 (7th ed. 1993), for comments from Justice Brennan and Justice Stevens about the

depth of a split required for this Court to grant a petition for certiorari.

III. No reason exists for grant of the petition for certiorari because the Eighth Circuit decision is correct.

The Eighth Circuit correctly decided the question before it: whether punitive damages are available under § 504 and Title II. Where Congress is silent as to remedies available in an implied right of action as in § 504 and Title II cases, this Court has made it clear that any appropriate relief is available: "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992). The Eighth Circuit applied this rule and determined that, if appropriate in this particular case as determined by the district court on remand, punitive damages are available under § 504 and Title II.

WAIVER BY PETITIONERS OF RIGHT TO ARGUE THAT PUNITIVE DAMAGES CANNOT BE AWARDED AGAINST A MUNICIPALITY

The Petitioners have waived their right to argue that punitive damages should not be awarded because the Board of Police Commissioners is a municipality. They waived it because they did not argue below that punitive damages cannot be awarded against a municipality under § 504 or Title II. In regard to punitive damages, the issue before the district court and the Eighth Circuit was

always and only whether punitive damages are allowed under § 504 or Title II against any defendant, municipal or non-municipal.

This Court has consistently held that it does not in the first instance decide questions neither raised nor resolved below. *TRW, Inc. v. Andrews*, 122 S.Ct. 441, 450-451 (2001); *Adarand Constructors, Inc. v. Mineta*, 122 S.Ct. 511, 514 (2001) (per curiam); *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999); *Glover v. United States*, 531 U.S. 198, 205 (2001); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). The first time Petitioners argued that punitive damages are not allowed against a municipality under either § 504 or Title II was in their petition for certiorari. Further, the first time Petitioners raise *City of Newport v. Fact Concerts, Inc.* and *Doe v. County of Centre* as the basis for not allowing punitive damages against a municipality is in their petition. Therefore, the Petitioners waived their right and should not be permitted to raise this question and to rely on *City of Newport* and *Doe v. County of Centre* for the first time in this Court.

The Petitioners' argument based on *City of Newport* and *Doe v. County of Centre* was never raised, considered, briefed, or argued by Petitioners, the Respondent, or the district court before or in the course of the trial, in the Petitioners' motion for a new trial, in the district court's opinion, in the Petitioners' briefs to the Eighth Circuit, at oral argument in the Eighth Circuit, by a supplement to the Eighth Circuit under F.R.A.P. Rule 28(j), in the Eighth Circuit's decision, or in the Petitioners' motion for reconsideration in the Eighth Circuit.

The Petitioners were given clear notice that punitive damages would be an issue in this case. The jury instructions were unambiguous, and the Petitioners had ample opportunity to object and failed to do so on the ground that they are a municipality. When invited by the district court to brief the issue of punitive damages, the Petitioners declined to do so. District Court trial transcript, 10, 13, 275. The issue is therefore waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 2001

Supreme Court, U.S.
FILED
DEC 27 2001
CLERK

(4)

No. 01-682

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent does not deny that the question whether punitive damages may be recovered in an implied cause of action under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, is both important and recurring. He does not deny that the Eighth Circuit placed itself in direct and acknowledged conflict with an 11-2 en banc decision of the Sixth Circuit, and then (over the dissenting votes of Judges Bowman and Loken) denied petitioners' request for rehearing en banc. And he does not dispute our showing (Pet. 13-15) that this conflict has been widely recognized by courts and commentators alike, or that district courts in other circuits are hopelessly divided over the proper resolution of this substantial question of federal law.

Instead, respondent attempts to chip away at the edges of our submission, contending that the conflict is not yet deep enough and that this case is a poor vehicle for resolving the question presented. As we explain below, these arguments are unavailing.

I. The Conflict in the Circuits

The Eighth Circuit in this case expressly disagreed with both the holding and the "methodology" of the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996). Pet. App. 8a, 12a. Without disputing the existence of a circuit conflict, respondent maintains that the conflict is not as deep as we suggest because neither the Fourth Circuit in *Pandazides* v. *Virginia Board of Education*, 13 F.3d 823 (1994), nor the Third Circuit in *Doe* v. *County of Centre*, 242 F.3d 437 (2001), actually resolved the question. Respondent is mistaken.

a. Respondent acknowledges that the Fourth Circuit in *Pandazides* "stated * * * that punitive damages can be awarded under § 504" (Br. in Opp. 5), but he claims this statement was "dicta." *Id.* According to respondent, the Fourth Circuit's unambiguous statement "was not necessary for a decision in the

case." *Id.* But the issue in *Pandazides* – whether a plaintiff suing under Section 504 has the right to a jury trial under the Seventh Amendment – turned on whether "the remedy available is * * * legal or equitable in nature." 13 F.3d at 829. In order to decide that question, the Fourth Circuit first had to determine precisely what remedies are available in an action under Section 504. It was in this context that the Fourth Circuit ruled – consistent with the Eighth Circuit's decision below – that punitive damages are recoverable in an action brought under Section 504. *Id.* at 830.

Respondent suggests that this ruling was unnecessary, because the Fourth Circuit also held that compensatory damages are recoverable under Section 504 and this conclusion was sufficient to support the court of appeals' resolution of the Seventh Amendment issue. That argument fundamentally misreads the opinion. The Fourth Circuit plainly did not regard its statements about punitive damages as unnecessary to its decision. On the contrary, the court expressly held that, under *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), a Section 504 plaintiff is entitled to seek "the full panoply of damages," without intimating that this "panoply" includes only compensatory, but not punitive, damages. What is more, the Fourth Circuit observed that in a previous case, *Eastman* v. *Virginia Polytechnic Inst. & State Univ.*, 939 F.2d 204 (1991), it had held that punitive damages "were unavailable under § 504," and it then proceeded to rule that *Eastman* was "no longer * * * good law" in light of this Court's decision in *Franklin*. See 13 F.3d at 830. Thus, the language characterized by respondent as "dicta" in fact *overruled* an earlier *holding* of the Fourth Circuit. That is not something dictum is capable of doing.

Not surprisingly, therefore, other courts – including district courts in the Fourth Circuit – have read *Pandazides* as squarely holding that punitive damages are recoverable in an action brought under Section 504. In *County of Centre*, for example, the Third Circuit stated that "the Fourth Circuit held in

Pandazides * * * that the plaintiff could seek punitive damages under Section 504." 242 F.3d at 456. Many other lower courts (and commentators) have acknowledged the *Pandazides* holding by noting that the Fourth Circuit's decision conflicts with the Sixth Circuit's decision in *Moreno*. See Pet. 13-14 n.7 (citing illustrative cases); *id.* at 15-16 n.8 (citing articles and treatises). And finally, as we explained in the petition (at 13 n.5) and respondents do not dispute, district courts in the Fourth Circuit have regarded *Pandazides* as binding and have followed its holding concerning the availability of punitive damages. See *Proctor* v. *Prince George's Hosp. Center*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (rejecting argument "that punitive damages are not available under the Rehabilitation Act" on ground that it "directly contradicts *Pandazides*"); see also *James* v. *Peter Pan Transit Mgmt., Inc.*, 1999 WL 735173, at *8 (E.D.N.C. Jan. 20, 1999) (Denson, Magistrate J.) (relying on *Pandazides* as having established that "punitive damages are available under section 504"). This Court should not regard as dicta language that district courts in the Fourth Circuit treat as binding.

b. Respondent next suggests that the Third Circuit's recent decision in *County of Centre* "does not evidence a circuit split" because it "held that a municipality was not liable for punitive damages under § 504 and Title II under the rationale of this Court's decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)." Br. in Opp. 5. "Unlike this case," respondent says, *County of Centre* "did not consider whether punitive damages are available *generally* under § 504 or Title II." *Ibid.* (emphasis added). While it is true that the Third Circuit relied on a narrower ground in disallowing punitive damages than did the Sixth Circuit in *Moreno*, that hardly detracts from the extent of the conflict in cases such as this. Henceforth in suits brought against municipal governments under either Section 504 or under Section 202 of the ADA in the Third Circuit, punitive damages are *not* available, whereas exactly the opposite is true in the Eighth Circuit under the decision below. Nor could there be any serious dispute that the result *in this case* would have been different had it been litigated in the Third Circuit. This

obvious conflict in result on an issue of federal law whose importance and recurring nature is undisputed should be of serious concern to this Court, even if it was theoretically possible for the Third Circuit to have rested its decision on a broader rationale.[1]

c. In sum, the conflict in the circuits is every bit as deep as we said it was. The Court should grant review now to resolve the 2-2 circuit split, dispel the pervasive confusion and conflicts in the federal district courts, and address the broader confusion over the meaning of *Franklin* that we identified (Pet. 16-17) and respondent does not dispute. Given the undisputed importance of the issue presented, respondent is quite wrong to suggest (at 5-6) that this conflict is tolerable.

II. The Finality of The Eighth Circuit's Decision

Respondent also argues that "[t]his case is not properly reviewable" because a "final judgment regarding punitive damages has not been issued" by the district court. Br. in Opp. 3. Contrary to respondent's suggestion, this Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other federal courts whose judgments are reviewable pursuant to [28 U.S.C.] § 1254(1)." STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE 195 (7th ed. 1993) ("STERN & GRESSMAN"). Thus,

[1] The Third Circuit's decision, moreover, was not that municipalities may assert an affirmative defense of immunity from punitive damages that would otherwise be available under Section 504 (and Section 202 of the ADA), but rather that Congress's intent in passing those provisions with respect to the availability of remedies must be understood against the backdrop of established municipal immunities. In other words, *County of Centre* – like the Eighth Circuit's decision in this case – turned on a determination of *congressional intent* as to available and appropriate remedies. Moreover, the Third Circuit flatly refused to apply the "opposing principle" expressed in *Franklin*. In the decision below, in contrast, the Eighth Circuit believed that *Franklin compelled* the opposite result.

there is no question that this Court has the *power* to exercise review in this case.

Respondent fares no better in his more limited contention that this Court should exercise its *discretion* not to grant review at this time. Br. in Opp. 4. The Eighth Circuit's decision dispositively resolves a critically important threshold question concerning the availability and appropriateness of punitive damages in suits brought under Section 504 and under Section 202 of the ADA. The narrow issue left for remand – whether the evidence presented in this case supports a punitive award of $1.2 million – will in no way affect the threshold ruling of the Eighth Circuit. See also Pet. 29-30 (explaining that court of appeals' remand included extremely narrow construction of concept of "appropriateness"). Regardless of the outcome of the remand, the Eighth Circuit's decision will remain circuit law – inviting a proliferation of punitive damages claims and depleting municipal treasuries in the Eighth Circuit through larger settlements – unless and until this Court steps in. And it is undisputed that there would be no need for the district court to reach the narrow issues remanded to it if review were granted and the Eighth Circuit's decision were reversed. The Eighth Circuit doubtless had these concerns in mind when – despite the obviously interlocutory posture of the case – it invited this Court "to inject additional clarity into this area." Pet. App. 16a.

This case therefore fits squarely into the category of interlocutory judgments that this Court has seen fit to review on certiorari. See STERN & GRESSMAN, at 196 ("where * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous cases). In recent years, this Court has accepted many such cases for review. See, *e.g.*, *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441 (2001); *United Dominion Indus.* v. *United States*, 121 S. Ct. 1934 (2001); *Norfolk Shipbuilding & Drydock* v. *Garris*, 121 S. Ct. 1927 (2001); *United States* v. *Hatter*, 121 S. Ct. 1782 (2001);

United States v. *Oakland Cannibis Buyers' Coop.*, 121 S. Ct. 1711 (2001); *Clark County School Dist.* v. *Breeden*, 121 S. Ct. 1508 (2001); *Buckman* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Pegram* v. *Herdrich*, 530 U.S. 211 (2000); *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000). And, as we explained in the petition (at 29) and respondent does not dispute, the posture of this case is identical to that of *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 45 (1979), where this Court granted review to determine the availability of punitive damages under a federal statute despite the court of appeals having ordered a remand to the district court for an inquiry into excessiveness. This case has already made three trips to the Eighth Circuit; this Court should not require a fourth before examining the important and recurring issue presented here.[2]

III. Respondent's Waiver Argument

Respondent also argues (Br. in Opp. 5, 6-8) that this case is a poor vehicle because petitioners failed to raise in the lower courts – and therefore assertedly waived – any argument based on this Court's decision in *City of Newport* v. *Fact Concerts,*

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[2] Respondent's reliance (Br. in Opp. 3-4) on a dissenting opinion in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), as well as on Justice Scalia's opinion respecting the denial of certiorari in *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993), is misplaced. As the very same page of SUPREME COURT PRACTICE cited by respondent explains, "the majority in the *Estelle* case apparently found" that the decision below, though interlocutory, presented an "important and clear-cut issue of law that is fundamental to the further conduct of the case." STERN & GRESSMAN, at 196; Br. in Opp. 4. As for *Virginia Military Institute*, that case involved a district court's decision rejecting an Equal Protection challenge to an all-male military school, which the court of appeals reversed as to liability and remanded for a determination, in the first instance, of what the proper remedy should be (among various alternatives). Under those rather unusual circumstances, where no remedial issue had been decided by the lower courts, Justice Scalia was of the view that it was "prudent" to await a final judgment before examining the interrelated issue of liability.

Inc., 453 U.S. 247 (1981), and the Third Circuit's decision in *Doe* v. *County of Centre*, 242 F.3d 437 (2001). This contention is meritless.

First, respondent fails to understand that this Court's "traditional rule * * * permit[s] review of an issue not pressed so long as it has been passed upon" by the lower court. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991) (rejecting Solicitor General's request to decline review, and to dismiss case as improvidently granted, where "the Court of Appeals, like the District Court before it, decided the substantive issue presented"). The issue presented in this case is whether "punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA." Pet. i. That *issue* was squarely decided by the Eighth Circuit when it held that petitioners were not officials of an arm of the state (but rather of a municipal government) and that they could be sued for punitive damages. The failure of petitioners to mention one consideration that should inform the inquiry into Congress's intent – the traditional immunity of municipalities from punitive damages awards – does not insulate the issue presented from review. For obvious reasons, this Court has never required that every *argument* on an issue presented be raised in or passed on by a court of appeals before an otherwise certworthy issue may be considered by this Court.

Second, respondent neglects to mention *why* petitioners did not raise arguments in the lower courts concerning the immunity of municipalities. Throughout this litigation, petitioners have consistently maintained that the Board of Police Commissioners of Kansas City, Missouri, is an "arm of the State" entitled to Eleventh Amendment immunity. Only when the Eighth Circuit issued its decision below was that argument finally rejected. It is hardly surprising, then, that petitioners would focus instead on their principal argument, as to which municipal immunity was not relevant. Under these circumstances, petitioners'

failure to make the *City of Newport* argument is entirely excusable.

Third, the Eighth Circuit's broad reading of *Franklin* makes abundantly clear that if petitioner had advanced an argument based on *City of Newport*, it likely would have been rejected out of hand – just as the Eighth Circuit brushed aside compelling evidence of Congress's intent based on the 1991 Civil Rights Act. See Pet. 20-21, 25-26.[3] Under the Eighth Circuit's cramped and indefensible reading of the concept of "appropriateness" (see Pet. 21-22) under *Franklin*, it is hard to see why an argument based on traditional concepts of municipal liability would have been any better received.

Respondent is accordingly wrong to suggest that this case is a poor vehicle because *City of Newport* was not mentioned below, or that any argument based on that case has somehow been waived. The issue presented in this case, which was squarely decided by the lower court, easily encompasses the argument based on *City of Newport*; indeed, it is difficult to see how this Court could be persuaded to ignore the history of municipal immunity in determining Congress's intent. There is no vehicle problem, or waiver, in this case.

IV. The Merits

Respondent makes only the most perfunctory attempt to defend the decision below on its merits. Br. in Opp. 6. He merely quotes the language from this Court's decision in *Franklin* that the Eighth Circuit misunderstood, and asserts that this misreading was in fact correct. Compare Pet. 20-30 (explaining in detail why decision below is incorrect). Not one

[3] In the lower court's view, *Franklin* compelled it to ignore evidence that when Congress amended *other* provisions of the Rehabilitation Act and the ADA to allow a limited punitive damages remedy subject to a cap, Congress "considered the new language necessary to create a punitive damages remedy under the acts" and "intended to expand, and not contract, the available remedies." Pet. App. 15a.

word of explanation is offered concerning how the Eighth Circuit's reading of *Franklin* can possibly be reconciled with this Court's decisions in *Gebser* v. *Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998), or *Lane* v. *Peña*, 518 U.S. 187 (1996). Nor does respondent even suggest how it would be possible to square the Eighth Circuit's decision with *City of Newport*.

Even the Eighth Circuit came to the decision below without "great satisfaction" (Pet. App. 15a) – recognizing that the Sixth Circuit's contrary ruling was animated by "concerns" that were "hardly misplaced" (*id.* at 13a), and openly inviting this Court to grant certiorari in light of its decision to "part[] ways with [its] sister circuit" (*id.* at 15a-16a). This Court should accept the Eighth Circuit's invitation and reverse the decision permitting an award of punitive damages against a municipal government in an implied cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

CONCLUSION

For the foregoing reasons, and those previously presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2001

Supreme Court, U.S.
FILED
DEC 20 2001
CLERK

(3)
No. 01-682

In The
Supreme Court of the United States

KAY BARNES, in her official capacity
as Member of the Board of Police Commissioners
of Kansas City, Missouri, et al.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICI CURIAE OF THE CITY OF SACRAMENTO AND OTHER CALIFORNIA CITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 37 of the Supreme Court Rules, the California Cities of Sacramento, Alameda, Avalon, Barstow, Carlsbad, Chula Vista, Corte Madera, Cotati, Daly City, Del Rey Oaks, Emeryville, Fresno, Hollister, Huntington Beach, Inglewood, Irvine, Laguna Beach, Lakewood, Lathrop, Long Beach, Los Angeles, Marina, Monrovia, Monterey, Moreno Valley, Placerville, Redlands, Redondo Beach, Rialto, Roseville, Ross, San Anselmo, San Bernardino, San Carlos, San Diego, San Francisco, San Joaquin, San Jose, San Luis Obispo, Santa Clara, Santa Rosa, Sunnyvale and West Covina respectfully submit this brief as *amici curiae* in support of the Petition for Writ of Certiorari of Petitioner Kay Barnes, in her official capacity as Member of the Board of Police Commissioners of Kansas City, Missouri, et al.

Each of the Cities participating as an *amicus curiae* is a member of the League of California Cities.[1] All such cities, through their respective counsel, have consented to the filing of this *Amicus* brief.

Amici have a compelling interest in the legal issues presented in this appeal. Because any punitive damage award against a municipality is paid with finite public funds, the imposition of such an award against a municipality necessarily reduces or curtails the programs, services or activities of the municipality at the expense of innocent municipal citizens and taxpayers.

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[1] As a matter of policy, the League of California Cities does not participate as an *amicus curiae* in its own name, but instead recommends participation by its individual municipal members, which the League has done in this case.

I.

SUMMARY OF ARGUMENT

The long established and unquestioned purpose of punitive damages is to punish and make an example of the wrongdoer. Such damages are by definition not awarded to compensate and are reserved only for the most egregious breaches of acceptable conduct.

The imposition of punitive damages against a public entity does not punish the wrongdoer and has only an attenuated deterrent effect, if any, on the wrongdoing public official. Because funds to pay an award of punitive damages are necessarily paid from public funds, the punishment falls on the innocent taxpayer through a reduction of municipal services and programs or an increase in taxes. The public entity may not be able to obtain reimbursement from the public official and even if indemnification is available, few public officials would be able to pay such an award. Moreover, in cases under the Americans with Disabilities Act or Rehabilitation Act, the conduct upon which punitive damages is predicated (*e.g.*, purposefully failing to comply with "program accessibility" requirements) is often far removed from the period when such damages are imposed. The responsible elected official or employee may no longer be with the municipality. Thus, the award would have no deterrent effect on the absent employee or official. Finally, the remedies already available under the Americans with Disabilities Act and Rehabilitation Act, including injunctive relief, compensatory damages and attorney fees, act as a sufficient deterrent. Imposing punitive damages

under these circumstances does nothing more than transfer taxpayer funds from the public to an already compensated plaintiff and his or her attorney.

The threat of punitive damages also has a deleterious effect on public programs and services. Municipal officials, in assessing whether to combat or resolve questionable suits under the ADA or Rehabilitation Act, may feel constrained to resolve a suit by providing far more of a monetary settlement and injunctive relief than the law requires in order to avoid the potential for a substantial punitive penalty. This is a particular danger in suits under the ADA and Rehabilitation Act because of the broad and somewhat amorphous nature of the requirements. While some would applaud exceeding in monetary or injunctive relief what is required under disability access laws, such relief would come at the expense of innocent citizens and taxpayers.

II.

ARGUMENT

In *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. 2001), the Eighth Circuit Court of Appeals held that punitive damages may be awarded against a public entity in cases brought under Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12132 *et seq.*) and the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)). The Eighth Circuit did so without any discussion of the peculiar concerns which are implicated in permitting punitive damages to be awarded against a public entity including its adverse effect on finite municipal budgets and necessary reduction in municipal services and programs. It also did so

without noting the ultimate (and innocent) victim of such an award – the municipal citizen and taxpayer. Finally, it did so without addressing "the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine [of municipal immunity from punitive damages].' " *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 263 (1981) quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Rather, the Eighth Circuit, relying upon *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) implied the existence of punitive damages as a remedy under Title II and the Rehabilitation Act without consideration of these concerns.

1. THE PURPOSES OF PUNITIVE DAMAGES ARE NOT SERVED IN AWARDING DAMAGES AGAINST A PUBLIC ENTITY:

The nature and purpose of punitive damages makes their imposition against a public entity questionable under any circumstances. The rationale for an award of punitive damages is well established and oft repeated when such an award is challenged: Their purpose is to punish a wrongdoer and deter the wrongdoer and others from similar extreme conduct. *Newport*, 453 U.S. at 266-267 (1981) citing Restatement (Second) Torts § 908 (1979) and W. Prosser, Law of Torts 9-10 (4th ed. 1971). These purposes are simply not served in assessing punitive damages against a public entity.

A. The Innocent Taxpayer, Not The Wrongdoing Tortfeasor, Is Punished:

In assessing punitive damages against a public entity, the punishment ultimately and directly falls on the innocent citizen. A public entity harbors no "malice" and can engage in no despicable or outrageous conduct not otherwise attributable to its officials. The public entity does not belong to the public servants and elected officials who make and carry out the necessary decisions and functions for operation of municipal government. Rather, it is an undeniable predicate of our democratic heritage that government, regardless of the level, is comprised of the governed and exists for their benefit. This separation of the individuals who make or carry out decisions which implicate standards for punitive damages from the people that they serve and who pay the taxes and upon whom the punishment ultimately falls makes the imposition of such damages fruitless and unjust. Penalizing the public entity does nothing more than penalize the citizens who invariably had nothing to do with the particular conduct at issue. Because municipal budgets are finite, a substantial punitive award against a public entity necessarily results in the reduction or curtailment of City services or programs or an increase in taxes.

B. The Imposition Of Punitive Damages Against A Public Entity Has Little Deterrent Effect On The Responsible Public Official:

The imposition of punitive damages against a public entity has only an attenuated deterrent effect, if any, on the responsible public official. Even assuming that the

public entity has a right of indemnification against the offending employee or official, as a practical matter, few public employees would be able to reimburse the public entity. Moreover, by the time punitive damages are imposed, the offending official may no longer be in office or employed by the public entity. Indeed, the inequity of imposing punitive damages against a public entity is particularly egregious in those situations where a public entity has acted with alacrity in taking steps to discipline the official or employee – steps which may include termination or ousting the official from office.

Moreover, the potential or reality of a large compensatory award as well as the concomitant attorney fee award operates as a sufficient deterrent while serving legitimate compensatory functions – something a punitive award does not. These points were addressed by the Court in *Newport*.

First, it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality. Indemnification may not be available to the municipality under local law, and even if it were, officials likely will not be able themselves to pay such sizable awards. Thus, assuming, arguendo, that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.

There also is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public

> excoriation of those who were elected, will not occur unless punitive damages are awarded against the municipality. The Court recently observed in a related context: "The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Carlson v. Green*, 446 U.S. [14], at 21 [(1980)]. This assumption is no less applicable to the electorate at large. And if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office.

453 U.S. at 269.

The ADA and Rehabilitation Act, like 42 U.S.C. § 1983, at issue in *Newport*, have sufficient remedies, without punitive damages, to deter the conscious breach of their requirements by public officials. Imposing punitive damages under these circumstances to an already compensated plaintiff and counsel does nothing more than provide a windfall to the plaintiff and counsel at the expense of the municipal citizen and taxpayer.

2. THE THREAT OF PUNITIVE DAMAGES HAS AN ADVERSE EFFECT ON MUNICIPAL DECISION MAKING:

The threat of punitive damage awards irregardless of an actual award has its own damaging effect on municipalities. "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages (cites omitted), the impact of these windfall recoveries is unpredictable and potentially substantial."

Electrical Workers v. Foust, 442 U.S. 42, 50 (1979). In *Foust*, the Court declined to allow the imposition of punitive damages under the Railway Labor Act for breach of a union's duty of fair representation. In declining to imply the punitive remedy, the Court spoke of the deleterious effect the threat of such an award would have on a union's broad discretion in handling grievances.

> Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members. *Id.* at 51-52.

Analogous concerns exist with respect to municipal decision making – specifically concerning lawsuits under the Americans with Disabilities Act and Rehabilitation Act. Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)) prohibits discrimination against the disabled in a "program or activity" receiving federal financial assistance. The primary substantive provision of Title II of the ADA (42 U.S.C. § 12132) repeats and somewhat broadens this prohibition, precluding discrimination against the disabled in a public entity's "services, programs, or activities" regardless of the funding source. Both the ADA and Rehabilitation Act are undoubtedly necessary and laudatory legislation with respect to the rights of the disabled.

However, in an effort to dispatch discrimination against the disabled in virtually all areas of government services, programs or activities, the legislation is less than clear in delineating the precise conduct to which a public entity is to conform itself. Neither the ADA or its regulations define what constitutes a "service, program or activity." Though the Rehabilitation Act does define "program or activity" as "all of the operations of [the public entity]," this broad definition and the absence of a definition under the ADA has caused public entities uncertainty over their obligations.[2] The threat of a large punitive award heightens concerns over the obligations and liability of a public entity under the ADA and Rehabilitation Act. As with unions, the threat of a future punitive award may compel a municipality's decision makers to undertake obligations far exceeding those required by the ADA or Rehabilitation Act. While some would applaud a municipality exceeding what the law requires, such excess would come at the expense of other municipal programs and services. Indeed, it is somewhat ironic that a substantial punitive award (such as the one in the instant case) or a settlement to avoid such an award, would provide a windfall to a single disabled individual while limiting or depriving other disabled (and able bodied) individuals of the programs, services and activities

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[2] The constitutional proscription against vague laws is "a basic principle of due process." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Within this doctrine is the idea that persons of ordinary intelligence should have a reasonable opportunity to know what is prohibited and that the standards should be clear enough to curb the danger of arbitrary or discriminatory enforcement. *Id.* at 109.

which the ADA and Rehabilitation Act mandate must be made accessible.

The experience of the City of Sacramento in attempting to decipher its obligations under the ADA and the Rehabilitation Act is undoubtedly not unusual. In 1999, the City was sued by a group of disabled individuals in the matter of *Barden, et al. v. City of Sacramento, et al.*, No. CIV-S-99-497 MLS/JFM (E.D.Cal.) The suit alleged, *inter alia*, that the City had violated Title II of the ADA and the Rehabilitation Act by failing to install curb ramps and failing to make "accessible" its existing sidewalks. According to the plaintiffs in that case, sidewalks are "programs" under the ADA and Rehabilitation Act imposing on the City an obligation to cure "excessive cross slopes," "obstructions in the path of travel" (signs, poles, grates, etc.), narrow widths and broken concrete (in many instances caused by tree roots). Like many American cities, Sacramento's infrastructure dates from the mid-nineteenth century and includes a substantial length of sidewalks. In light of the broad nature of the ADA requirements and the possibility of an economically debilitating obligation being imposed, the City initially sought to negotiate with the Plaintiffs. Unable to satisfy their demands, the City ultimately turned to the court to resolve the issue. The Court agreed with the City holding that sidewalks are not "programs" under the ADA or Rehabilitation Act. The plaintiffs have appealed the Court's ruling to the Ninth Circuit where it is currently pending (No. 01-15744).

The threat of punitive damages being awarded compounds the uncertainty public entities are experiencing with respect to their obligations under Title II of the

Americans with Disabilities Act and the Rehabilitation Act. Public entities exist for the benefit of and serve all their citizens, not just the disabled. The threat of an award of punitive damages coupled with the broad nature of these laws creates a high risk of serving one group in excess of what the law requires at the expense of the municipalities' remaining citizens.

III.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Petition for a Writ of Certiorari be granted.

Dated: December 10, 2001

Respectfully submitted,

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GRANTED

No. 01-682

Supreme Court U.S.
FILED
MAR 29 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether punitive damages are among the full panoply of remedies Congress made available to plaintiffs suing for violations of Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973.

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STATEMENT OF THE CASE

The sole issue properly presented in this case is whether punitive damages are ever available to plaintiffs under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. Whether the facts of this or any other case merit such an award is not before the Court. Nonetheless, while purporting to present a summary of the facts in the light most favorable to respondent and to the jury verdict in the district court, petitioners have loaded their factual statement with irrelevant descriptions of their own evidence, which the jury did not credit.

A. Facts

The facts established at trial and credited by the jury can be quickly summarized. Respondent Jeffrey Gorman is paraplegic as a result of a spinal cord injury and uses a wheelchair for mobility. Tr. 50-51. On the night of May 30, 1992, he visited a bar in Kansas City, Missouri, where he hoped to meet an acquaintance. Shortly after his arrival, a bouncer ejected him from the premises because the bar did not allow wheelchairs on the dance floor. Tr. 58-63.

Believing that he had been discriminated against, Mr. Gorman sought the assistance of nearby uniformed police officers. Tr. 64-65. The officers, who turned out to be moonlighting as private security, instead arrested Mr. Gorman for trespassing and summoned a Kansas City police van to take him to the station. Tr. 70, 65.

When the van arrived, Mr. Gorman saw that it had no wheelchair lift, no wheelchair restraints, and no alternative means of securely transporting a person with a spinal cord injury. Mr. Gorman told the police officers that he would not be able to support himself in the van's seats and could not safely be transported in the van. Instead of heeding Mr. Gorman's warnings, the officers lifted him from his wheelchair and placed him on a bench in the back of the van. Because he could not sit upright on the bench, the officers attempted to

use his belt to tie him to a wire mesh wall behind the bench. J.A. 5-10.

When the van started moving, Mr. Gorman could not hold himself upright. During the trip, his belt broke and he was thrown to the floor of the van, where he remained the rest of the way to the station. His full urine bag (which the police officers had not allowed him to empty before loading him onto the van) broke when he fell, soaking him. Tr. 79-83. He suffered severe injuries to his shoulder and back from the fall as well as an infection that resulted from urine being forced back into his body by pressure on the bag before it burst. Mr. Gorman's injuries required extensive medical treatment including shoulder surgery. Unfortunately, the back injuries Mr. Gorman suffered in the van cannot be surgically repaired because of his preexisting spinal injury. As a result, Mr. Gorman continues to suffer intense pain and spasms in his lower extremities—conditions that are likely to be permanent and that have prevented him from continuing to work full-time. J.A. 12-20.[1] The actual damages Mr. Gorman incurred from his treatment at the hands of the police included lost wages, medical bills, pain and suffering, and humiliation.

Mr. Gorman's injuries are not attributable to an isolated incident of police misconduct. The evidence established that the officers who arrested and transported Mr. Gorman had no training in the safe transportation of disabled persons, and that the Kansas City Police Department had no vans that were accessible to passengers in wheelchairs and no policies concerning the transportation of people with disabilities. J.A. 25-29, 42. Moreover, petitioners stipulated that although they had repeatedly filed written assurances with the federal government that their practices and policies complied with the Rehabilitation Act of 1973, those assurances were false. J.A.

[1] Petitioners' outlandish speculation that Mr. Gorman suffered these injuries while careening down a hill with a woman on his lap was contradicted by Mr. Gorman's evidence at trial and rejected by the jury.

69. Petitioners also stipulated that they did not begin to bring themselves into compliance with the Rehabilitation Act nor to train their officers about the requirements of the ADA and the Rehabilitation Act until after Mr. Gorman was injured. J.A. 69-70.

B. Procedural History

The procedural history of this case is convoluted, but its relevant features are straightforward. Mr. Gorman sued petitioners, Kansas City's Police Commissioners, in the United States District Court for the Western District of Missouri, seeking actual and punitive damages under Title II of the ADA and Section 504 of the Rehabilitation Act. After two appeals, the case was tried to a jury, which rendered a verdict for Mr. Gorman and awarded over $1 million in compensatory damages and $1.2 million in punitive damages.

Petitioners moved for judgment as a matter of law, arguing that punitive damages are never available against any defendant for violations of Title II or Section 504. Petitioners did not assert that their status as a governmental entity rendered them immune from punitive damages under the rationale of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The district court accepted petitioners' argument and set aside the jury's award of punitive damages.

The parties filed cross-appeals. Mr. Gorman's appeal argued that punitive damages are available under Title II of the ADA and Section 504, while petitioners' appeal rested primarily on their argument that they were an instrumentality of the State of Missouri and were entitled to Eleventh Amendment immunity from any action for damages (compensatory or punitive) under Title II or Section 504. In opposing Mr. Gorman's appeal, petitioners again did not argue that punitive damages were unavailable under *City of Newport.*

The Eighth Circuit reversed the district court's holding that punitive damages are unavailable under Title II and Section 504, but affirmed in all other respects. The court of ap-

peals rejected petitioners' argument that the Kansas City Board of Police Commissioners is an arm of the State entitled to Eleventh Amendment immunity from suit in federal court. With respect to the award of punitive damages, the court ruled that because both Title II and Section 504 create private rights of action without specifying the precise relief available, any appropriate relief is presumptively available under this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The court held that punitive damages fall within the scope of the relief available under Title II and Section 504 in appropriate circumstances. Accordingly, the Eighth Circuit remanded the case to the district court for "an independent review of the evidence to determine whether it supports punitive damages." Pet. App. 16a.

SUMMARY OF ARGUMENT

Title II of the Americans with Disabilities Act, enacted in 1990, broadly outlaws discrimination against people with disabilities in the provision of public services by public entities. Title II expands and extends rights previously granted only against recipients of federal funds under Section 504 of the Rehabilitation Act of 1973. Consistent with the broad purposes of Title II, Congress adopted a sweeping set of remedies. In contrast with other provisions of the ADA, which set forth express limits on remedies, Title II adopted the remedial provisions applicable to Section 504 of the Rehabilitation Act (as well as other federal civil rights statutes such as Title VI and Title IX)—remedies that had already been held by this Court to include private rights of action with no expressly stated limits on the relief available.

In adopting the unfettered remedial provisions of Title II, Congress unambiguously provided plaintiffs with a right of action for damages, and, indeed, with the full panoply of remedies generally available at law and in equity. Congress' stated intent to provide the full array of legal and equitable relief corresponds precisely with the generally applicable presumption that a federal court may award any appropriate

relief when Congress provides a private right of action and does not clearly limit the relief available. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Because punitive damages have long been recognized by this Court as an important tool in the arsenal of relief available in the federal courts under appropriate circumstances, their availability under Title II of the ADA, as well as under Section 504 of the Rehabilitation Act, is dictated both by Congress' affirmative desire to make available the full panoply of remedies and by the *Franklin* presumption that all such remedies should be provided unless Congress directs otherwise. Moreover, punitive damages serve the purposes of both Title II of the ADA and Section 504 by supplementing other enforcement mechanisms and adding the deterrence necessary to achieve Congress' goal of eliminating discrimination against people with disabilities.

Petitioners' status as a municipality does nothing to alter these conclusions. The argument that petitioners' governmental status bars punitive damages under *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), was never presented or decided below and is thus not before the Court. Even if it were, any presumption that punitive damages are not available against government entities would be overcome by clear evidence of congressional intent that governmental bodies be subject to the same rules of liability under the ADA and the Rehabilitation Act as private persons. Moreover, the policy considerations dispositive in *Newport* are absent here. In particular, the alternative deterrent mechanism of punitive damages against individual officials who violate the law is unavailable under the ADA and Rehabilitation Act, which have not been held to create rights of action against individuals. In addition, punitive damages awards will at times be necessary to prevent local governments and their taxpayers from reaping financial windfalls through noncompliance with the ADA.

ARGUMENT

I. TITLE II OF THE ADA CREATES A PRIVATE RIGHT OF ACTION WITH A FULL PANOPLY OF REMEDIES.

Underlying all the arguments of petitioners and the Solicitor General is the notion that the right of action at issue in this case is an "implied" one. But unlike other cases where the "implication" of a private right of action is a matter of debate and inference, here it is manifest that Congress explicitly created a private right of action in Title II of the ADA when it expressly incorporated remedial provisions under which the existence of a private right of action had already been established both by judicial decision and by direct legislation. Equally apparent is that the right of action Congress created carries with it a panoply of remedies specifically including damages. Because an understanding of these points is critical to the ultimate determination of the relief available under Title II, a detailed explanation of the remedial provisions of Title II and their relationship with other parts of the ADA—and other civil rights statutes—is necessary.

A. Congress Deliberately Created a Private Right of Action to Enforce Title II of the ADA.

The enactment of the Americans with Disabilities Act reflected Congress' determination to eradicate discrimination against people with disabilities and to mandate the steps needed to provide them with equal access to employment, government services, and public accommodations. To achieve these ends, Congress invoked all of its powers, "including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The resulting legislation, as this Court has recognized, is a "broad mandate," "sweeping" in its scope and "expansive" in its purposes—"a milestone on the path to a more decent, tolerant, progressive society." *PGA*

Tour, Inc. v. Martin, 532 U.S. 661, 675, 680 (2001) (quoting *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

The ADA's substantive provisions are divided into three titles addressing different aspects of the problem of unequal treatment of people with disabilities and providing remedies of very different scope. Title I of the Act generally forbids employment discrimination against people with disabilities by both governmental and private entities. ADA § 102, 42 U.S.C. § 12112. As originally enacted, Title I incorporated the "circumscribed remedies" (*Landgraf v. USI Film Products*, 511 U.S. 251, 285 n.38 (1994)) provided by Title VII of the Civil Rights Act of 1964—remedies that, as of 1990, did not include damages. ADA § 107(a), 42 U.S.C. § 12117(a) (incorporating remedies of 42 U.S.C. §§ 2000e-4, -5, -6, -8, and -9); *see, e.g., Landgraf*, 511 U.S. at 252 ("Before the enactment of the 1991 [Civil Rights] Act, Title VII afforded only 'equitable' remedies."); *United States v. Burke*, 504 U.S. 229, 238 (1992) (before passage of the Civil Rights Act of 1991, Title VII did "not allow awards of compensatory or punitive damages; instead, it limit[ed] available remedies to backpay, injunctions, and other equitable relief").

Similarly, Title III of the ADA, which forbids discrimination in the provision of "public accommodations" by private entities (*see* ADA § 302, 42 U.S.C. § 12182), incorporates the limited remedies set forth in 42 U.S.C. § 2000a-3(a) for violations of Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations. *See* ADA § 308(a)(1), 42 U.S.C. § 12188(a)(1). Section 2000a-3(a) in turn provides a private right of action only for "preventive" (*i.e.*, declaratory or injunctive) relief. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Like Title II of the Civil Rights Act, Title III of the ADA provides for enforcement actions brought by the Attorney General, in which civil penalties and monetary damages for victims of discrimination are available only if the Attor-

ney General requests them. ADA § 308(b)(2), 42 U.S.C. § 12188(b)(2). Title III does not authorize a private right of action for damages, and it expressly forbids punitive damages. ADA § 308(b)(4), 42 U.S.C. § 12188(b)(4).

The remedial provisions of Title II of the ADA, at issue here, are significantly different from those of Titles I and III. Title II broadly outlaws unequal treatment of people with disabilities by State and local governments, by forbidding both outright, intentional discrimination and exclusion from or denial of the benefits of government services, programs, or activities. ADA § 202, 42 U.S.C. § 12132. The substantive prohibitions of Title II are based on its predecessor, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), but its coverage of public entities is broader: Whereas Section 504 was based in part on the Spending Clause and was limited to federal agencies and programs and activities receiving federal financial assistance, Title II of the ADA, grounded on Congress' powers under the Commerce Clause and the Fourteenth Amendment, applies to all activities of State and local governments, regardless of the sources of their funding. Moreover, Title II's antidiscrimination mandate goes further than Section 504's. *See Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999) (Title II, unlike Section 504, prohibits discrimination that is not "solely" on account of disability).

Like Titles I and III, Title II has its own remedial provision. But unlike the other titles, its remedial scheme does not limit the private remedies available. Instead, Title II expressly incorporates the remedial scheme for violations of Section 504 of the Rehabilitation Act. Thus, Section 203 of the ADA (42 U.S.C. § 12133) states that the remedies available under Section 505 of the Rehabilitation Act (29 U.S.C. § 794a) for violations of Section 504 "shall be the remedies ... [the ADA] provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." ADA § 203, 42 U.S.C. § 12133. The relevant portion of Section 505, which was added to the Rehabilitation Act in

1978, provides in turn that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by" any violation of Section 504. 29 U.S.C. § 794a(a)(2).[2]

The significance of these provisions, from the standpoint of the enacting Congress in 1990, is clear: Title II of the ADA authorizes a private right of action for violations of the requirements of Section 202 of the Act. Several factors support this conclusion. First, when the ADA was enacted, this Court had already recognized that Section 505(a)(2) of the Rehabilitation Act, whose remedies Section 203 of the ADA adopted, created a private right of action for retrospective relief to enforce Section 504 of the Rehabilitation Act. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984) ("This case requires us to clarify the scope of *the private right of action to enforce Section 504 of the Rehabilitation Act....*") (emphasis added).

Second, this Court had earlier recognized a private right of action to enforce Title IX. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Title IX's remedial provisions parallel those of Title VI. Indeed, this Court based its recognition of a private right of action under Title IX in large part on congressional awareness at the time Title IX was enacted of lower-court decisions holding that there was a private right of action under Title VI. *Id.* at 694-98. Likewise, the drafters of Title II of the ADA can only have intended to enact a private right of action when they incorporated the Rehabilitation Act's remedies, which in turn incorporated those of Title VI, which were identical to those that this Court had held created a private right of action in *Cannon*. *Cf. id.* at 696-97 ("It is

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[2] Also relevant is Section 505(b) of the Rehabilitation Act, which provides that a court may grant the prevailing party (other than the United States) a reasonable attorney's fee in "any action" brought under the Act. 29 U.S.C. § 794a(b). That provision demonstrates that the drafters of Section 505 contemplated that it authorized a right of action.

always appropriate to assume that our elected representatives, like other citizens, know the law ...").

Third, seven of the Justices in the fractured opinions in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), recognized a private right of action under Title VI itself, although the Justices were not in accord on the scope of that private right. *See id.* at 593-95 (opinion of White, J., joined by Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring); *id.* at 615 (Marshall, J., dissenting); *id.* at 635 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). Again, the ADA's adoption of Section 504's remedies, which in turn incorporated the Title VI remedies that were acknowledged in *Guardians* to support a private right of action, manifested a clear congressional intent to enact a private right of action.

Fourth, in 1986, Congress had enacted the Rehabilitation Act Amendments to abrogate the States' Eleventh Amendment immunity from damages in actions brought to enforce Section 504 (as well as in actions under Title VI, Title IX, and the Age Discrimination Act of 1975). 42 U.S.C. § 2000d-7(a). The legislation further provided that "[i]n a suit against a State for a violation of [Section 504], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in [a] suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). As this Court has recognized, the Rehabilitation Act Amendments can only be understood as reflecting congressional ratification of a private right of action under Section 504 and the other statutes referenced in 42 U.S.C. § 2000d-7(a). *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72-73 (1992); *id.* at 78 (Scalia, J., concurring in the judgment). This congressional endorsement of a Section 504 right of action plainly extends to Title II of the ADA, given Title II's explicit incorporation of Section 504's remedies.

Finally, the legislative history of Title II of the ADA dispels any doubt on the issue by stating expressly that Congress was aware of and intended to incorporate into Title II the private right of action to enforce Section 504:

> Section [203] incorporates the remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973. ... *The Rehabilitation Act provides a private right of action, with a full panoply of remedies available*, as well as attorney's fees.

H.R. Rep. No. 101-485(III), at 52 (1990) (emphasis added).

B. The Panoply of Title II Remedies Includes Damages.

In *Guardians*, a "clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation." *Franklin*, 503 U.S. at 70. Of course, as the Congress that enacted the ADA well knew, the damages remedy available under Title VI would necessarily be available under Section 504, and thus was also incorporated into Title II of the ADA when it adopted the remedies available for violations of Section 504.

In addition, the Rehabilitation Act Amendments of 1986 presupposed the existence not only of a private right of action to enforce Section 504, but also of a damages remedy—otherwise, abrogation of the States' Eleventh Amendment immunity would have been unnecessary, and the statute's reference to the availability of "remedies both at law and in equity" (42 U.S.C. § 2000d-7(a)(2)) would have made no sense. Thus, the 1986 legislation "must be read ... not only 'as a validation of *Cannon*'s holding,' ... but also as an implicit acknowledgment that damages are available." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

Again, the legislative history of the ADA confirms that Congress adopted a damages remedy when it enacted Title II. The House Judiciary Committee Report's explicit statement that the private right of action under Section 504, which Title

II adopts, comes "with a full panoply of remedies available" is clear enough standing alone. H.R. Rep. No. 101-485(III), at 52. To drive home the point, the Committee Report cited *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982), which had expressly affirmed the availability of damages in a private right of action under Section 504. H.R. Rep. No. 101-485(III), at 52 n.62. In enacting Title II, therefore, Congress was aware of and adopted judicial decisions holding damages available under Section 504.[3]

Not every court that had ruled on the issue as of 1990 had agreed with *Miener* that damages were available for a violation of Section 504, but whether *Miener* in fact correctly interpreted the Rehabilitation Act is now beside the point. What matters is that Congress understood there to be a private right of action for damages for violations of Section 504 when it adopted Title II of the ADA. By expressly adopting the remedies it *understood* to be available under Section 504, Congress created damages remedy under Title II. *Cf. Cannon*, 441 U.S. at 711 ("[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.") (citation omitted).[4]

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[3] *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), another case approvingly cited in the House Judiciary Committee Report (H.R. Rep. No. 101-485(III), at 51), also held that Section 504 provided a "full panoply" of remedies, including damages. 567 F. Supp. at 382-83. *Nelson*'s "full panoply" language was cited by another district court in holding punitive damages available under Section 504. *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1138 (D. Iowa 1984).

[4] For this reason, the arguments made by petitioners and the Solicitor General about the state of the law in 1978, when Congress enacted Section 505 of the Rehabilitation Act, have little relevance. The determinative issue now is not what remedies the Congress that enacted Section 505 thought were available under Title VI, but what remedies the Congress that enacted the remedial provisions of Title II of the ADA in 1990 provided. *Cannon* illustrates the point. There, the Court held that the argument that Title VI was not originally intended to provide a private right

(*Footnote continued*)

This Court's decision in *Franklin* confirms that the Congress that enacted the ADA was correct in understanding that Section 504 included a private damages remedy. *Franklin* holds that, in cases involving intentional violations, damages are an available remedy in the implied right of action under Title IX. 503 U.S. at 76. *Franklin*'s reasoning, which relies heavily on the majority's recognition of a Title VI damages remedy in *Guardians*, on the Rehabilitation Act Amendments of 1986, and on "the traditional presumption in favor of any appropriate relief" (*id.* at 73) when Congress creates a right of action, is as applicable to Section 504 (and to Title II of the ADA) as it is to Title IX. *Franklin* thus underscores that when Congress enacted Title II of the ADA, it *correctly* believed that a damages remedy was available under Section 504, and it expressly incorporated that remedy into Title II.

II. THE PANOPLY OF TITLE II AND SECTION 504 REMEDIES INCLUDES PUNITIVE DAMAGES.

Given that Congress created a private right of action for damages in Title II of the ADA, the issue here is whether that right of action, and its preexisting counterpart under the Rehabilitation Act, is to be truncated to exclude altogether the

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of action when it was enacted in 1964 was largely irrelevant to the question whether Congress intended to create a private right of action when it incorporated Title VI's provisions into Title IX in 1972: "Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable." *Cannon*, 441 U.S. at 710-11. Thus, the fact that as of 1978, some lower courts had (erroneously) held that *no* damages, compensatory or punitive, were available under Title VI (*see Rendon v. Utah State Dept. of Employment Sec. Job Serv.*, 454 F. Supp. 534, 536-37 & n.3 (D. Utah 1978)), is of no significance in resolving the scope of the remedies Congress intended to adopt when it enacted the ADA in 1990, following twelve years of legal developments that had convinced Congress that damages were available under both Title VI and Section 504.

possibility of awarding punitive damages, regardless of the circumstances of a particular case. Principles firmly established by the decisions of this Court foreclose circumscribing the right of action under Title II of the ADA or the Rehabilitation Act in such a manner.

A. Any Appropriate Relief—Including Punitive Damages—Is Presumptively Available.

As the Eighth Circuit correctly perceived, this Court's most authoritative pronouncement on the issue is *Franklin v. Gwinnett County Public Schools*. There, the issue was whether the private right of action under Title IX, which the Court had previously recognized in *Cannon*, encompassed a damages remedy in cases involving intentional violations. *Franklin*'s holding that damages were available was based on the principle "that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief," 503 U.S. at 69—a principle that, the Court stated, "has deep roots in our jurisprudence." *Id.* at 66.

Accordingly, the Court held, "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, ... we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* Elsewhere in the opinion, the Court stated the rule as follows: "[A]ll appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies," *id.* at 68; "[T]he 'existence of a statutory right implies the existence of all necessary and appropriate remedies,'" *id.* at 69 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)); "[T]he traditional presumption [is] in favor of a federal court's power to award appropriate relief in a cognizable cause of action," *id.* at 70; "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," *id.* at 70-71; "[T]he traditional presumption [is] in favor of any appropriate relief for violation of a federal right," *id.* at 73. The Court emphasized the importance of "our historic judicial authority to award appropriate relief in cases brought in our court system," and declined to engage in "selective abdication" of this authority by ruling out particular remedies absent clear congressional directives foreclosing their use. *Id.* at 74.

Franklin rested on a long line of decisions of this Court holding that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see Franklin*, 503 U.S. at 66-68 (citing case law underlying *Bell v. Hood*). The opinion in *Franklin* pointed out that this Court had consistently adhered to this principle in cases such as *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), *Carey v. Piphus*, 435 U.S. 247 (1978), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). More pertinent here, the Court observed that the acceptance of a damages remedy under Title VI by the majority of the Justices in *Guardians*, as well as the Court's recognition of a retrospective monetary remedy for Section 504 violations in *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 631, reflected applications of the presumption in favor of all appropriate remedies in cases where a right of action exists.

The *Franklin* presumption is fully applicable to punitive damages. This Court has repeatedly recognized that punitive damages are a part of the ordinary remedial arsenal of the courts and have long been "a firmly established feature of American law." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in the judgment). In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that the Seventh Amendment afforded a right to trial by jury in actions seeking damages under Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3613), and observed that "the relief

sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." 415 U.S. at 196.

The Court has also acknowledged that punitive damages are among the judicial remedies typically available for aggravated wrongs in cases such as *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 274, 278 & n.24 (1989), and *Haslip*, 499 U.S. at 15-17. As the Court stated in *Molzof v. United States*, 502 U.S. 301, 306 (1992):

> Although the precise nature and use of punitive damages may have evolved over time, and the size and frequency of such awards may have increased, this Court's decisions make clear that the concept of "punitive damages" has a long pedigree in the law. "It is a well-established principle of the common law, that in actions for trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." *Day v. Woodworth*, 13 How. 363, 371 (1852).

Or, as the Court put it more succinctly in *United States v. Burke*: "[P]unitive or exemplary damages are generally available in those instances where the defendant's conduct was intentional or reckless." 504 U.S. at 237.

Consistent with its recognition that punitive damages are among the range of remedies ordinarily available (where circumstances warrant) in American courts, this Court has held that punitive damages are potentially available in actions to vindicate rights guaranteed by federal law even in the absence of express statutory authorization, except where Congress has foreclosed them. Thus, the Court has held that punitive damages are available in actions under 42 U.S.C. § 1983, *see Smith v. Wade*, 461 U.S. 30 (1983); *Carey v. Piphus*, 435 U.S. at 257 n.11, in actions under 42 U.S.C. § 1981, *see Johnson v. Railway Express Agency*, 421 U.S. 454

(1975),[5] and, perhaps most significantly, in *implied* rights of action under the Constitution (*i.e.*, *Bivens* actions), *see Carlson v. Green*, 446 U.S. 14, 22 (1980).

In *Carlson v. Green*, the Court stated its reasons for allowing punitive damages in *Bivens* actions in a nutshell: "Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' ... and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." 446 U.S. at 22 (quoting *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971)). The reasons the *Carlson* Court gave for the availability of punitive damages in a right of action implied from the Constitution are equally (if not more) applicable to a right of action Congress has deliberately created by statute: As one of the "remedial mechanism[s] normally available in the federal courts" (*id.*), punitive damages are, under the reasoning of *Franklin*, presumptively available (where appropriate) in an otherwise cognizable cause of action to vindicate statutory rights.

B. No Clear Congressional Directive Bars Punitive Damages under Title II or Section 504.

Under *Franklin*, the issue whether punitive damages are available for violations of Title II of the ADA (and Section 504 of the Rehabilitation Act) depends on whether "there is a clear direction to the contrary by Congress." *Franklin*, 503 U.S. at 70-71. Absent such a clear direction, the *Franklin* presumption in favor of any appropriate relief controls.

As both the majority and the concurrence in *Franklin* observed, only rarely will a statute provide a clear direction one way or the other about the remedies available under an im-

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[5] *See also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001) ("42 U.S.C. § 1981 permit[s] the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination....").

plied right of action. As the majority put it, "it is hardly surprising" when Congress "[says] nothing about the applicable remedies for an implied right of action." *Id.* at 71; *see also id.* at 76 (Scalia, J., concurring in the judgment).

Title II of the ADA, however, is not a statute in which the existence of a private right of action is a matter of inference in the face of congressional silence or ambiguous legislative history. Rather, Title II represents an instance where Congress expressly adopted a right of action. In so doing, Congress did not provide a "clear direction" that punitive damages or any other particular remedies be foreclosed. Rather, Congress' action affirmatively manifests an intent that there be no restrictions on the nature of the relief available to plaintiffs under Title II.

As explained above, at the time Congress enacted Title II and adopted the remedies available under Section 505(a) of the Rehabilitation Act, case law and prior congressional action (especially the adoption of the Rehabilitation Act Amendments of 1986) pointed unequivocally to the existence of an implied right of action for monetary damages under Section 505(a) for violations of Section 504 of the Rehabilitation Act. Under such circumstances, where there is no doubt that Congress created a private right of action, there is nothing "question begging" (*Franklin*, 503 U.S. at 77 (Scalia, J., concurring in the judgment) about inferring an intent to allow any appropriate relief when Congress has not imposed any limits on the available remedies. Rather, as even the concurring Justices in *Franklin* agreed, "[w]e can plausibly assume acquiescence in our *Bell v. Hood* presumption when the Legislature says nothing about remedy in expressly creating a private right of action; perhaps even when it says nothing about remedy in creating a private right of action by clear textual implication ...." *Id.* Here, Congress' express adoption of a right of action that had definitively been held to exist places the ADA's Title II in the category of statutes that expressly create a private right of action but do not define the

scope of the remedy. Congress' decision not to limit the relief available under such a statute strongly supports the availability of any relief, including, in appropriate cases, punitive damages.

Moreover, Title II's legislative history shows that Congress' failure to limit the relief available under Title II was not inadvertent, but reflected a deliberate choice to provide plaintiffs using the private right of action borrowed from the Rehabilitation Act with "a full panoply of remedies." H.R. Rep. No. 101-485(III), at 52. Given that punitive damages are undoubtedly part of the "full panoply of tools traditionally used by courts to do justice between parties," *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring in the result), the legislative history shows that Congress intended that they be among the remedies potentially available in appropriate cases under Title II.[6] Thus, far from overcoming the *Franklin* presumption in favor of any appropriate relief, the direct evidence of Congress' intent jibes perfectly with it.

The overall structure of the ADA also reveals that if Congress had intended to foreclose punitive damages under Title II, it would have done so expressly. A comparison of Title II's remedial provisions to those in Title III of the Act is particularly instructive. As noted above (at pp. 7-8), Title III, which outlaws disability discrimination in private-sector "public accommodations," creates a limited damages remedy enforceable only in actions brought by the Attorney General. Title III permits the recovery of "such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General." ADA § 308(b)(2)(B), 42 U.S.C. § 12188(b)(2)(B).

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[6] *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 n.11 (1999) (statute intended to provide "full panoply of remedies" for patent violations would have subjected States to punitive damages but for Eleventh Amendment).

However, the statute also expressly provides that "[f]or purposes of subsection (b)(2)(B) of this section, the term 'monetary damages' and 'such other relief' does not include punitive damages." *Id.* § 308(b)(4), 42 U.S.C. § 12188(b)(4).

The statute's express exclusion of punitive damages illustrates not only that Congress knew how to—and did—exclude punitive damages when it wanted to do so, but also, and more importantly, that Congress was aware that if it provided a right of action for "monetary damages" and did *not* exclude punitive damages, the likely (and logical) inference would be that it intended to permit them. Put another way, the provision implies that a "damages" remedy *includes* punitive damages unless the term is defined to exclude them—a result that, again, is precisely in line with the general presumption in favor of any appropriate relief established in such cases as *Bell v. Hood* and *Franklin*. Given that the legislative history of Title II makes clear that Congress was specifically aware that it was providing a right of action for *damages* when it adopted the remedies of the Rehabilitation Act (*see supra* pp. 6-13), Congress' failure to exclude *punitive* damages in Title II, as it did in Title III, reflects its intent not to foreclose them in appropriate cases under Title II.

Petitioners, backed by the Solicitor General, seek to find support for their contrary view of congressional intent by pointing to the amendment of the remedial provisions of Title I of the ADA in the Civil Rights Act of 1991. In that legislation, Congress for the first time provided for compensatory and punitive damages, subject to a cap of $300,000, in employment discrimination actions against nongovernmental employers under Title VII of the Civil Rights Act of 1964, Section 501 of the Rehabilitation Act, and Title I of the ADA. *See* 42 U.S.C. § 1981a(a) & (b). Petitioners and the Solicitor General observe that this legislation was intended to "expand" the remedies available under the ADA and the Rehabilitation Act, and they argue that if uncapped punitive damages were already available under Title II of the ADA

and/or Section 505(a) of the Rehabilitation Act, the provisions of the 1991 Act would not have "expanded" the available remedies, but would actually have limited them.

This argument reflects a fundamental misunderstanding of the differences between the remedial scheme for employment discrimination under Title I of the ADA and the remedies for discriminatory denials of access to public services under Title II of the Act. As originally enacted in 1990, Title I adopted the expressly limited employment discrimination remedies of Title VII of the Civil Rights Act, under which a successful plaintiff could obtain only equitable remedies such as reinstatement, other injunctive relief, backpay, and "frontpay." *See* ADA § 107(a), 42 U.S.C. § 12117(a) (incorporating Title VII remedies); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-48 (2001). Title VII specifically did "not allow awards for compensatory or punitive damages." *United States v. Burke*, 504 U.S. at 238; *see also Pollard*, 532 U.S. at 847-48, 851; *Landgraf v. USI Film Products*, 511 U.S. at 285 n.38.

The expressly limited Title VII remedial scheme adopted in Title I of the ADA thus contrasted sharply with the "common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies." *United States v. Burke*, 504 U.S. at 241. As *Franklin* confirmed, Title II of the ADA, like the statutes whose remedial scheme it adopted (Section 504, Title VI, and Title IX) fall into the category of federal antidiscrimination statutes offering broad remedies similar to those available under the common-law tradition. Indeed, *Franklin* roundly rejected the government's suggestion that remedial limits similar to those of Title VII should be read into these statutes. There, the Court stated (503 U.S. at 75):

> Finally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what

remedies are available for violation of a federal right, this position conflicts with sound logic.

Grasping the fundamental differences between, on the one hand, the Title VII remedial model as originally adopted by Title I of the ADA in 1990 and, on the other hand, the Title VI-Title IX-Section 504 model incorporated in Title II of the ADA is essential to understanding why the "expansion" of the *employment discrimination* remedies in the 1991 Civil Rights Act is irrelevant to the scope of the remedies available under Title II. As this Court has explained, the 1991 Act "expanded the remedies available to [employment discrimination] plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages." *Pollard*, 532 U.S. at 848.[7] Before the 1991 Act, the statutes expressly ruled out awards of compensatory and punitive damages for most employment discrimination plaintiffs; after the passage of the Act, such damages (subject to the statutory caps) were available to employment discrimination plaintiffs under Title VII, Title I of the ADA, and Section 501 of the Rehabilitation Act. That was plainly an "expansion" of the available remedies for employment discrimination, *regardless* of whether punitive damages were already potentially available for violations of Title II of the ADA. That Congress chose in 1991 to expand the "circumscribed remedies" (*Landgraf*, 511 U.S. at 285 n.38) that were previously available for employment

[7] *See also Pollard*, 532 U.S. at 851 ("In 1991, ... Congress further expanded the remedies available in cases of intentional employment discrimination to include compensatory and punitive damages."); *Landgraf*, 511 U.S. at 253-55 ("[The 1991 Act] significantly expands the monetary relief potentially available to plaintiffs who would [only] have been entitled to backpay under prior law. ... In short, ... the 1991 Act effects a major expansion in the relief available to victims of employment discrimination."); *United States v. Burke*, 504 U.S. at 241 n.12 ("Congress' decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable under Title VII ....").

discrimination under the ADA does not support an inference that the remedies under Title II were ever similarly circumscribed, nor does it suggest any intention to limit the remedies already available under Title II.

Indeed, the framers of the 1991 Act were careful *not* to limit punitive damages remedies that already existed under the civil rights laws. Under 42 U.S.C. § 1981, punitive damages were already available to civil rights plaintiffs who could prove that prospective employers had refused to enter into contracts with them on account of race. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75, 181-82 (1989) (reaffirming *Runyon v. McCrary*, 427 U.S. 160 (1976)); *Johnson v. Railway Express Agency*, 421 U.S. at 460 (holding punitive damages available for employment discrimination under § 1981). The 1991 Act, even while capping the punitive damages potentially available under Title VII, expressly provided that "[n]othing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title." 42 U.S.C. § 1981a(b)(4). Thus, as this Court explained in *Pollard*:

> [Before 1991,] 42 U.S.C. § 1981 permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination. Thus, [the 1991 Act] brought all forms of intentional employment discrimination into alignment, at least with respect to the forms of relief available to successful plaintiffs. However, compensatory and punitive damages awarded under § 1981a may not exceed the statutory limitations set forth in § 1981a(b)(3), while such damages awarded under § 1981 are not limited by statute.

532 U.S. at 851. More broadly, *Pollard* emphasized that the new damages remedies created by 42 U.S.C. § 1981a were all "*in addition*" to remedies already available (*id.* at 852), and

were not intended to limit relief that could be awarded before 1991. *Id.* at 854.

In the final analysis, then, the real significance of the 1991 Act to this case is twofold: First, the Act was not intended to eliminate or limit the scope of remedies that were already available under the ADA or other civil rights legislation. The 1991 Act therefore cannot be construed as affecting the availability of punitive damages under Title II of the ADA. Second, like the exclusion of punitive damages under Title III of the ADA, 42 U.S.C. § 1981a demonstrates that when Congress intended to deny or limit punitive damages when creating a damages remedy under the ADA and related statutes, it did so expressly. Because Congress did not impose any such limitation on the damages relief available under Title II, this Court should not take it upon itself to do so.

C. The Punitive Damages Remedy Serves the Policies of Title II and Section 504.

A punitive damages remedy in appropriate cases is fully consistent with the policies underlying both Title II of the ADA and Section 504 of the Rehabilitation Act. The ADA reflects an ambitious and far-reaching policy "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and, to achieve that purpose, "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) & (2); *see also Martin*, 532 U.S. at 674-75.

Critical to the goal of eliminating discrimination against people with disabilities is the provision of remedies to achieve that end. The Committee Reports on the Act observed that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions," and that "attempts to weaken the remedies available under the ADA would make the ADA an 'empty promise of equality.'" H.R. Rep. No. 101-485(II), at 40 (1990); *see also* S. Rep. No. 101-116, at 15 (1989). The House Report noted the "poor enforcement of existing federal disability rights legislation" (*i.e.*, Section 504), H.R. Rep. No. 101-485(II), at 40, and the Senate Report characterized existing federal laws as "inadequate." S. Rep. No. 101-116, at 18. In the words of one witness cited in the House Report, "There has not been enough compliance with the 504 regulations. ... It is not enough to just have it down on the books." H.R. Rep. No. 101-485(II), at 40. Illinois Attorney General Neil Hartigan, in testimony cited in the Senate Report, summed up the rationale for strong remedies: "The whole trick is to make it more expensive to break the law than it is to keep the law." S. Rep. No. 101-116, at 15.

Punitive damages advance the ADA's policy of eliminating discrimination against people with disabilities by doing just that: making it more expensive to violate the Act than to comply with it. As this Court has recently observed, punitive damages are by nature extremely well adapted to this end. "[P]unitive damages ... serve an obvious public function in deterring future violations," and they "may often have a greater impact on ... behavior ... than the threat of an injunction." *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 764-65 (2002).

Petitioners and the Solicitor General largely ignore the congruence between the policies and purposes of the ADA and the availability of punitive damages for violations of Title II of the Act. Instead, they focus on the Rehabilitation Act and contend that an award of punitive damages for a violation of Section 504 is inconsistent with the scheme of federal enforcement under the Act—in particular, with the availability of a federal funding cutoff as a penalty for aggravated violations of Section 504.[8] A punitive damages remedy, they

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[8] Petitioners and the Solicitor General note that there are federal enforcement regulations under the ADA as well as the Rehabilitation Act, but they do not point to any particular enforcement mechanism under the

(*Footnote continued*)

contend, would displace this carefully wrought enforcement system and impose penalties more severe than the funding cutoff that, they argue, is in effect the "statutory maximum."

Concerns about the possible disproportionality between punitive damages and the funding cutoff remedy, however, have no application to Title II of the ADA. Because Title II is not limited to federally funded activities, its remedies need hardly be measured against the irrelevant enforcement mechanism of a cutoff of federal funds. Moreover, any concern that punitive damages might frustrate the purposes of the Rehabilitation Act by leading potential funding recipients to forgo federal financial assistance that might benefit people with disabilities clearly does not extend to punitive damages awards under Title II. An entity subject to Title II could derive no benefit from declining to accept federal funds, because doing so would not insulate it from Title II's proscriptions or remedies. Allowing the broad remedial and deterrent goals of the ADA to be limited by concerns that apply only to the narrower scope of the Rehabilitation Act would be a classic case of the tail wagging the dog.

Moreover, even as applied to Section 504, petitioners' theory is nothing more than an attempt to resurrect an argument that the Court disposed of over 20 years ago in *Cannon*. There, the defendant argued that permitting a private right of action under Title IX would be inconsistent with federal enforcement of Title IX through the withdrawal of funding from noncompliant programs. This Court rejected the argument for a number of reasons. The Court emphasized that the purpose of the statute was not only to prevent federal funding of discrimination, but also, more broadly, to protect citizens

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ADA regulations that is inconsistent with a punitive damages remedy. Petitioners contend that a punitive damages remedy will allow them to be punished for violations of what they call "housekeeping" regulations, but they do not explain how the knowing violation of critical substantive regulations at issue here was merely a matter of "housekeeping."

from discrimination—a goal that private enforcement would advance. 441 U.S. at 704. In addition, the Court recognized that federal enforcers have limited resources and that permitting private remedies allows pursuit of violations that federal agencies may not even be able to investigate. *Id.* at 707 n.41. Perhaps most significantly, the Court pointed out that a funding cutoff is a severe, "last resort" remedy that enforcers will be loath to use except in the most extreme cases. *Id.* at 704-05 & nn. 38-39. Given the limited efficacy of this remedy, the Court concluded that private remedies, far from interfering with federal enforcement, would advance the statutory purpose of combating discrimination. *Id.* at 704-08.[9]

Seven of the nine Justices of this Court who participated in the *Guardians* decision four years after *Cannon* reached the same conclusion. Justice White's lead opinion, joined by Justice Rehnquist, concluded that the existence of a private right of action (including monetary remedies for intentional violations) was not inconsistent with the statutory funding cutoff sanction under Title VI. *See Guardians*, 463 U.S. at 593-94, 597. Justice Marshall's opinion succinctly stated the reasons private remedies can, and indeed must, coexist with the defunding mechanism:

> Private retrospective relief also constitutes a 'necessary supplement' to the administrative enforcement mechanism contained in Title VI. ... The statutory sanction of a fund cutoff cannot sufficiently ensure general compliance with the command of Title VI, because the sheer quantity of federal financial assistance programs makes Government enforcement alone impractical and because a fund cutoff is too Draconian to be widely used. Retrospective liability for Title VI violations comple-

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[9] Despite their focus on the importance of the funding cutoff remedy, neither petitioners nor the Solicitor General contest *Cannon*'s point that the remedy is so rarely used as to be largely ineffective.

ments administrative enforcement by providing a more realistic deterrent against unlawful behavior.

Id. at 626-27 (Marshall, J., dissenting). Similarly, Part I of Justice Stevens' opinion, which Justices Brennan and Blackmun joined, and with which Justice O'Connor agreed (*see id.* at 612 (O'Connor, J., concurring in the judgment)), concluded that the funding cutoff mechanism did not preclude private remedies under Title VI, including retrospective relief. *Id.* at 638-39.

Petitioners contend, however, that punitive damages are different from other damages because awards of punitive damages may exceed the amount of federal financial assistance a funding recipient receives, rendering the relief even more draconian than a funding cutoff. The argument, however, proves both too much and too little. Too much, because in some cases, even a compensatory damages award could exceed the amount of financial assistance a defendant receives, *see Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), yet compensatory damages are available under Spending Clause measures despite the existence of the federal funding cutoff enforcement mechanism. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 640-41 (1999); *Franklin*, 503 U.S. at 74-75. Too little, because in the great majority of cases a damages award, whether compensatory or punitive, will likely not approach the amount of money a funding recipient receives from the federal government over time. *See Guardians*, 463 U.S. at 601 ("an award of damages would not be as drastic a remedy as a cutoff of funds") (opinion of White, J.); *id.* at 638-39 n.7 ("[T]he record in this case gives no basis for thinking that the cost of an appropriate award of damages to the petitioners would exceed the total amount of respondents' federal subsidy. And, as a general proposition, it is usually assumed that a cutoff of federal funds would be significantly more drastic than an individualized remedy for the victim of a Title VI violation.") (Stevens, J., dissenting).

The enormous and unlawful financial windfall gained in this case by Kansas City over its many years of noncompliance with Title II and Section 504, coupled with the likelihood that in most cases damages awards will be far smaller than the federal financial assistance received by the defendants, renders irrelevant petitioners' repeated complaint that defendants in general, and local governments in particular, will not be able to withstand purportedly unchecked jury awards of punitive damages. That concern is hardly substantiated here given the approximately one-to-one ratio of compensatory to punitive damages, the gravity of the misconduct Mr. Gorman endured, and the evidence of petitioners' long history of knowing disregard of federal law. In any event, the district court has not yet determined whether the award of punitive damages in this case was "appropriate" under *Franklin*, including whether petitioners' conduct reflected "reckless or callous indifference to the federally protected rights of others," Pet. App. 16a (quoting *Smith v. Wade*, 461 U.S. at 56), and whether the amount awarded satisfied constitutional standards of proportionality.[10]

III. PETITIONERS' EFFORTS TO TAKE THIS CASE OUTSIDE THE *FRANKLIN* FRAMEWORK ARE UNAVAILING.

A. The *Franklin* Presumption Does Not Exclude Punitive Damages.

Petitioners and the Solicitor General argue that punitive damages do not fall within *Franklin*'s presumption in favor of the availability of "any appropriate relief." Rather, they

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[10] This Court therefore need not consider whether, in a proper case, an award of punitive damages might be limited by consideration of the amount of federal financial assistance received by a defendant and/or the financial gain reaped by the defendant through noncompliance with federal law. *Cf. TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 461-62 (1993) (opinion of Stevens, J.) (considering wrongdoer's potential gain in assessing propriety of punitive damages award).

assert, *Franklin* rested on case law concerning the availability of "remedial" relief for the redress of injuries—a category that, they say, includes compensatory damages but not punitive damages, whose function is not to make the victim whole but to penalize and deter misconduct.

The argument that punitive damages are not "remedies" within the meaning of *Franklin*, however, flies in the face of a host of decisions of this Court. In *Carlson v. Green*, for example, this Court expressly referred to punitive damages as a "remedial mechanism," 446 U.S. at 22, and as an element of a "remedial scheme." *Id.* at 22 n.10. The Court used the same terms to refer to punitive damages in *Silkwood*, which held that preemption of state-law "remedies," specifically including punitive damages, would not be presumed absent clear evidence of congressional intent. 464 U.S. at 255.

Moreover, in *Smith v. Wade*, the Court rejected precisely the argument now advanced by petitioners and the United States. There, the Court held that punitive damages are available under Section 1983 even though Section 1983 does not expressly authorize punitive damages, but provides only that defendants may be held "liable to the party injured in an action at law, suit in equity, or other proper proceeding for *redress*." 42 U.S.C. § 1983 (emphasis added). The Court flatly rejected the proposition that the use of the term foreclosed availability of punitive damages. 461 U.S. at 36 n.5.

Likewise, the Solicitor General errs in contending that this Court's decision in *Carey v. Piphus*, 435 U.S. 247, erected a general "compensation principle" that disfavors punitive damages in actions based on violations of federal rights. *Carey v. Piphus* rejected an award of damages that purported to provide compensation for purely abstract injuries; but the opinion expressly acknowledged that the principle that compensatory damages must be measured and limited by actual injuries is not incompatible with the award of punitive damages for violations of federal statutory and constitutional rights "in a proper case." 435 U.S. at 257 n.11. In-

deed, *Smith v. Wade* relied in part on *Carey v. Piphus* in holding punitive damages available in Section 1983 actions. 461 U.S. at 36 n.5.

Even more remarkable is the Solicitor General's argument that the reasoning of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), limits relief in implied rights of action to compensatory damages because only such damages are necessary to provide a remedy to plaintiffs for whom, in Justice Harlan's famous words, "it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring). If the Solicitor General's reading of *Bivens* were correct, punitive damages would be unavailable in *Bivens* actions—but as *Carlson v. Green* teaches, *Bivens* permits punitive damages. 446 U.S. at 22. Thus, the Solicitor General's *Bivens* example disproves his point.

Petitioners' related point that *Franklin* does not support an award of punitive damages because barring such damages would not leave Mr. Gorman without a remedy is similarly meritless. *Franklin* itself made clear that the availability of one remedy does not depend on all other remedies being futile. Thus, the *Franklin* Court rejected the argument that damages were permissible under Title IX only where equitable relief was inadequate. *See* 503 U.S. at 75-76.

Equally unpersuasive is the Solicitor General's argument that *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, erected a presumption against the availability of punitive damages in implied statutory rights of action. The majority opinion in *Foust* neither mentions such a presumption nor purports to announce any general principles concerning the circumstances under which punitive damages should be available in implied statutory rights of action. Instead, the *Foust* majority's rejection of punitive damages awards against labor unions in implied rights of action for breach of the duty of fair representation rested on the Court's analysis of factors particular to the field of labor relations—considerations that, in the majority's view, compellingly

demonstrated that Congress did not intend to provide such a remedy. Thus, the Court emphasized that "the threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations," 442 U.S. at 51-52, and rejected their availability "[b]ecause general labor policy disfavors punishment." *Id.* at 52. Only in this specific factual context did the majority state that it would not permit punitive damages without "clear congressional guidance." *Id.*

Unlike the majority opinion in *Foust*, the concurring opinion, written by Justice Blackmun and joined by Chief Justice Burger and Justices Rehnquist and Stevens, did discuss the general principles governing the availability of remedies in general—and punitive damages in particular—in implied rights of action. Justice Blackmun's opinion anticipated the majority's approach in *Franklin* by asserting that, in a cause of action properly before it, a federal court "has at its disposal the full panoply of tools traditionally used by courts to do justice between parties." 442 U.S. at 53 (Blackmun, J., concurring in the result). "Punitive damages," Justice Blackmun continued, "being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise." *Id.* Four years later, in *Silkwood*, the Court expressly adopted this aspect of Justice Blackmun's *Foust* concurrence in holding that the burden is on a party opposing punitive damages "to show that Congress intended to preclude such awards." 464 U.S. at 255 (citing *Foust*, 442 U.S. at 53 (Blackmun, J., concurring in the result)).[11]

[11] Adoption of the Solicitor General's new presumption *against* punitive damages where Congress creates a right of action but does not specify the relief available would have far-reaching consequences beyond this case. The lower courts have broadly agreed that the *Franklin* presumption applies to punitive damages not only under civil rights legislation such as Title VI, Title IX, Title II of the ADA, and Section 504, but under a range of other statutes as well. *See, e.g., Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and (*Footnote continued*)

The Solicitor General further contends that decisions refusing to recognize the *existence* of rights of action, such as *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515 (2001), support a narrow construction of the relief available where Congress provides a right of action, assertedly because "separation of powers" concerns cast doubt on the legitimacy of judicial recognition of forms of relief not expressly provided for by statute. The Solicitor General's argument is at odds with *Franklin*, which rejected precisely the same argument.

In *Franklin*, as here, the Solicitor General argued that the Court's refusal to recognize implied rights of action for violations of some statutory rights reflected abandonment of the presumption in favor of any appropriate relief where a right of action is available. The Court stated unequivocally that the government's position reflected a fundamental "misunderstanding over the difference between a cause of action and the relief afforded under it." *Franklin*, 503 U.S. at 69. The Court further explained that "[u]nlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no ... increase in judicial power," *id.* at 73-74, and hence poses no threat to separation of powers principles. Indeed, the Court stated, separation of powers principles would be undermined more by judicial abdication of the power to award traditionally available remedies than by exercise of that authority. *Id.* at 74.

Health Act); *Lebow v. American Trans Air*, 86 F.3d 661 (7th Cir. 1986) (Railway Labor Act); *Beckett v. Atlas Air, Inc.*, 968 F. Supp. 814 (E.D.N.Y. 1997) (Railway Labor Act); *Oldroyd v. Elmira Sav. Bank*, 956 F. Supp. 393 (W.D.N.Y. 1997) (FIRREA), *vacated in part on other grounds*, 134 F.3d 72 (2d Cir. 1998); *Burns-Vidlak v. Chandler*, 980 F. Supp 1144 (D. Haw. 1997) (ADA Title II and Section 504; citing cases), *app. dism'd*, 165 F.3d 1257 (9th Cir. 1999); *Canty v. Old Rochester Regional School Dist.*, 54 F. Supp. 2d 66 (D. Mass. 1999) (Title IX).

B. The *Franklin* Presumption Applies to Section 505 of the Rehabilitation Act.

Notwithstanding that *Franklin*'s presumption in favor of any appropriate relief is generally applicable to punitive damages, petitioners (but not the Solicitor General) argue that the presumption is specifically inapplicable to the right of action created by Section 505(a) of the Rehabilitation Act, and, by extension, to Title II of the ADA. Petitioners contend that this Court so held in *Lane v. Peña*, 518 U.S. 187 (1996), but their argument tears language from that opinion out of its context and distorts the holding of the Court.

The issue in *Lane* was whether, in creating a right of action for monetary damages for violations of Section 504 of the Rehabilitation Act, Section 505(a)(2) constituted a sufficiently unambiguous waiver of the sovereign immunity of the United States to permit actions for damages against federal agencies alleged to have violated Section 504 directly in the conduct of their activities. The Court held that such actions were barred by sovereign immunity because Section 505(a)(2) expressly provided for remedies only against federal agencies acting in their capacities as "provider[s] of [Federal financial] assistance" and did not explicitly create a right of action against federal agencies that directly conducted programs or activities. *See* 518 U.S. at 192-93. *Lane*'s holding that Section 505(a)(2) did not provide a *cause of action* against a federal agency acting as a direct provider of government services has no bearing on the issue here, as it is undisputed that both the ADA and the Rehabilitation Act provide a cause of action against petitioners.

To be sure, in arriving at its holding, *Lane* rejected the argument that the *Franklin* presumption supported a damages claim *against the federal government* under Section 505(a)(2), for two reasons. First, the requirement that waivers of the sovereign immunity of the United States be express precluded resort to *Franklin*'s presumption about the availability of remedies not expressly provided. 518 U.S. at 196.

Second, the Court noted that Section 505(a)(2) *expressly* addresses the issue of what entities it authorizes remedies against, yet *omits* federal agencies except when acting as funding providers. *Id.* at 196. By expressly addressing that particular issue, the Court held, Section 505(a)(2) rendered the *Franklin* principle inapplicable to the specific question presented in *Lane*: whether damages were available against federal agencies not acting as funding providers. *Id.*

In holding that Section 505(a)(2)'s specificity about *who* was amenable to suit took "*this case* outside the 'general rule' we discussed in *Franklin*," *id.* (emphasis added), the Court did not, as petitioners suggest, hold that the *Franklin* presumption was altogether inapplicable to remedies under Section 505(a)(2). Such a holding would have made no sense, for although Section 505(a)(2) specifically addresses *who* is subject to the remedies it authorizes, it does not specifically delineate the *scope* of the relief available against those entities. Instead, it incorporates the remedies that are *impliedly* available under Title VI, to which the *Franklin* presumption applies. *See Franklin*, 503 U.S. at 70.[12] Thus, the *Franklin* presumption also necessarily controls the scope of the relief available under Section 505(a), and, therefore, under Title II of the ADA.

C. Spending Clause Concerns Do Not Limit the Relief Available under Title II or Section 504.

Petitioners and the Solicitor General further contend that, regardless of whether the conventional *Franklin* presumption in favor of any appropriate relief would otherwise permit the award of punitive damages for violations of Title II and Section 504, the Spending Clause concerns articulated in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, and

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[12] The one exception to this lack of specificity is that Section 505 expressly provides for attorney's fees in addition to whatever other remedies are available. *See* 29 U.S.C. § 794a(b).

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), limit the relief available even for intentional violations of the Rehabilitation Act and preclude imposition of punitive damages under it. Although they acknowledge that the ADA is not a Spending Clause enactment, they further contend that because Title II adopts the remedies of Section 505(a) of the Rehabilitation Act, it is also subject to Spending Clause-based limits on remedies. Neither part of the petitioners' argument withstands scrutiny.

Gebser provides no support for the view that the Spending Clause limits the relief available for intentional civil rights violations to remedies expressly defined by statute, and, indeed, other decisions of the Court expressly reject that theory. In *Gebser*, this Court, following such prior decisions as *Pennhurst* and *Guardians*, held that a defendant subject to the constraints imposed by Title IX only because of its receipt of federal funds may not be held liable for damages solely because of *conduct* that it did not know (and indeed, could not have known) would place it in violation of Title IX's prohibitions. *See* 524 U.S. at 287-90. As this Court explained the following year in *Davis v. Monroe County Board of Education*, 526 U.S. at 640, the essential teaching of *Gebser*, as well as *Pennhurst* and *Guardians*, on which *Gebser* is based, is that under Spending Clause legislation, "private damages actions are available only where recipients of federal funding had adequate notice that they could be held liable *for the conduct at issue*" (emphasis added). *Davis* went on to hold that where the defendant did have such notice (as where it intentionally engaged in the unlawful conduct at issue or was aware of and deliberately indifferent to it), the defendant may be subjected to the full range of appropriate relief available under *Franklin*. *Id.* at 642-43.[13]

[13] *Davis* and *Franklin*, which recognized tort-like damages remedies for violations of Spending Clause measures, also refute petitioners' argu-

(*Footnote continued*)

The *Gebser* limit on the *type of conduct* for which defendants may be held liable under Spending Clause legislation thus offers no support for the argument that the Spending Clause also limits the *form of relief* available for conduct, such as that in this case, that meets the standard for liability. Indeed, this Court expressly held in *Franklin* that the Spending Clause principles articulated in *Pennhurst* (of which *Gebser* is only the most recent application) did *not* limit the relief available for intentional violations of Spending Clause-based civil rights legislation. As *Franklin* stated:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. See *id.*, at 17. This problem does not arise in a case such as this, in which intentional discrimination is alleged.

503 U.S. at 74-75 (emphasis in original). The Spending Clause concerns animating *Gebser* and *Pennhurst* thus provide no support for curtailing the remedies available in cases involving intentional civil rights violations such as those in this case.[14] *Gebser*'s reservation of some judicial discretion concerning the scope of implied remedies permits courts to define the *circumstances* under which particular remedies are

ment that only "contract" remedies are available for violations of Spending Clause statutes.

[14] Neither petitioners nor the Solicitor General suggest that the *Gebser* standard of liability (assuming its applicability to Title II, a non-Spending Clause measure) was not satisfied in this case. Indeed, that issue is not even before this Court.

available, but not to exclude categorically particular forms of relief.

Petitioners' attempt to transform *Gebser* from a requirement of clear notice of the type of conduct that will give rise to liability into a requirement that Congress clearly specify the types of relief to which a funding recipient will be subject for intentional violations would have vast consequences. Taken seriously, it would require the Court to overturn the entire body of case law, beginning with *Cannon*, running through *Guardians* and *Darrone*, and culminating in *Franklin* and *Davis*, that recognizes rights of action for injunctive and monetary relief under Title VI, Title IX, and Section 504. Since, in all those cases, the remedies were implied rather than expressly provided for in the statute, in none of the cases could it be said that the funding recipient was clearly on notice that its conduct would subject it to the particular relief at issue. Indeed, petitioners acknowledge that their position on the Spending Clause is inconsistent with this Court's recognition of private rights of action under Spending Clause legislation. Pet. Br. 18. Nonetheless, they argue that the Court should draw the line at punitive damages—but they advance no principled distinction from the standpoint of the Spending Clause between that relief and the remedies the Court has already permitted. Their inability to provide a coherent justification for their proposed transformation of the *Gebser* principle dooms their argument.

Even if petitioners' Spending Clause analysis were persuasive with respect to the availability of punitive damages for violations of Section 504 of the Rehabilitation Act, it would remain irrelevant to whether punitive damages are available under Title II of the ADA. Whatever limits the Spending Clause may place on relief under statutes passed on its authority, there is no basis for importing those constitutional limits into the ADA, a statutory scheme based on sources of authority to which limits on the spending power are irrelevant. Title II is indisputably not Spending Clause

legislation: Its provisions apply regardless of whether a public entity or program receives federal funding, and the enacting Congress expressly "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce." 42 U.S.C. § 12101(b)(4). As the Court recognized in *Gebser*, Spending Clause constraints have no application to such legislation, which "applies … without regard to federal funding" and "is framed in terms not of a condition [on funding] but of an outright prohibition." 524 U.S. at 286. Where, as here, Congress has invoked its full authority and has acted broadly to outlaw discrimination and provide its victims with a full panoply of remedies, *Gebser*'s Spending Clause concerns have no bearing on the scope of relief available. To hold otherwise would allow Congress' invocation of multiple powers in different statutes to drag the level of remedies down to those supported by the least potent power invoked in the narrowest statute.

Although they recognize that Title II of the ADA has nothing to do with the Spending Clause, petitioners contend that because Title II adopts the Rehabilitation Act's remedial scheme, relief under Title II must also be subject to Spending Clause limits. Petitioners bury this crucial link in the chain of their argument in a footnote that cites no authority. *See* Pet. Br. 21 n.13. Even if the Spending Clause does limit the forms of relief under Section 505(a)(2) of the Rehabilitation Act, petitioners' argument is unpersuasive. Petitioners do not suggest that the remedial limit that they purport to derive from *Gebser* is grounded in the *text* of Section 505(a)(2). Rather, they contend that the limit is imposed on the statute by the Constitution. Even if a Spending Clause limitation were superimposed on the remedies otherwise available under the terms of Section 505(a)(2), however, that would not mean that Congress intended to adopt that limitation when it incorporated the terms of Section 505(a)(2) into legislation based on constitutional powers that are not even arguably subject to a similar limitation. *See Garcia v. S.U.N.Y. Health Sciences*

Center of Brooklyn, 280 F.3d 98, 113, 115 (2d Cir. 2001) (different constitutional constraints may be applicable to remedies under Title II and the Rehabilitation Act because of the different constitutional powers pursuant to which they were enacted).[15]

In fact, there are compelling reasons to believe that Congress could not have imported Spending Clause-based limits on relief (assuming for the sake of argument that they exist) into Title II of the ADA. First, such limits are inconsistent both with the "sweeping" and "expansive" purpose of the ADA (*Martin*, 532 U.S. at 675, 680) and with Congress' explicit intent to provide the full panoply of remedies to Title II plaintiffs. Second, Congress could not possibly have intended to incorporate all the limits on the Rehabilitation Act's Section 505(a)(2) remedies into Title II of the ADA. Section 505(a)(2), by its express terms, provides remedies only against funding recipients and federal funding agencies—a scope generally commensurate with the limits on Section 504's substantive reach and with the extent of congressional Spending Clause power. In adopting Section 505(a)(2)'s remedies to enforce the broader proscriptions of Title II of the ADA, which are in no way limited to programs that receive federal funds, Congress obviously did not intend to limit remedies under Title II to funding recipients or funding agencies. That limitation would have made no sense, and

[15] Although the Solicitor General agrees with petitioners that the Spending Clause limits the relief available for violations of Section 504 and that the same limits apply to Title II, the United States has previously taken the position that Spending Clause remedial limits do *not* apply to Title II. *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997). The majority in *Tyler* did not address this argument because it was raised only by the United States as amicus curiae, and not by a party to the case. *Id.* The third member of the panel, Judge Jenkins, dissented from the majority's decision not to reach the issue and explained at length why Spending Clause limits were inapplicable to the remedy provided in Title II of the ADA. 118 F.3d at 1404-16 (Jenkins, J., dissenting).

would have rendered Title II, for practical purposes, entirely redundant of Section 504. Congress must have contemplated, when it adopted Section 505(a)(2)'s remedies in Section 203 of the ADA, that the Title II remedy would go further than would be permissible under a Spending Clause enactment.

IV. THE *NEWPORT v. FACT CONCERTS* DOCTRINE DOES NOT BAR PUNITIVE DAMAGES HERE.

A. The *Newport* Issue Was Neither Raised Nor Decided Below, and This Court Should Not Address It in the First Instance.

Petitioners and the Solicitor General argue, somewhat halfheartedly, that whatever the general rule on the availability of punitive damages under Title II of the ADA and Section 504 of the Rehabilitation Act may be, punitive damages should not be available against petitioners under the principles of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), because, as members of a Board of Police Commissioners sued in their official capacity, petitioners are a "municipality." Pet. Br. 23-25; U.S. Br. 31-32. Although one might have assumed from the phrasing of petitioners' question presented ("[w]hether punitive damages may be awarded against a municipal government ...") that the *Newport* point would be their principal argument, their failure to emphasize the issue now is readily explained by their failure to present it in any manner to the courts below. As an issue neither argued nor decided in either the district court or the court of appeals, it is not properly before this Court.

In the district court and the court of appeals, petitioners' principal argument was that punitive damages were not available against *any* defendant under Title II and Section 504. Their briefs in the court of appeals did not so much as cite *Newport*. In the lower courts, petitioners did not even acknowledge that they *were* a municipality. On the contrary, they contended that they were an instrumentality of the State of Missouri, and they argued not for exemption from punitive

damages under *Newport*, but for Eleventh Amendment immunity from *any* action for damages (an argument the Eighth Circuit rejected on the strength of this Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997)).[16] Not until their petition for certiorari did petitioners argue that, as a municipality, they could not be subjected to punitive damages under the *Newport* rationale—an entirely different argument from the Eleventh Amendment argument advanced below.

It is a long-established principle that this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002). The Court applied this rule in circumstances very similar to those presented here in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). That case presented the statutory question whether Title II of the ADA applied to the programs offered by state prison systems. In this Court, the petitioner sought to argue for the first time a related but different issue: Whether the application of Title II to State governments was a proper exercise of Congress' constitutional powers. Although that issue had a direct bearing on whether the petitioner was even amenable to suit under the Eleventh Amendment, the Court declined to reach it (*id.* at 212-13):

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[16] Even had petitioners established that they were part of the State, their claim of immunity would have had to contend with the statutory abrogation of sovereign immunity in both the ADA and the Rehabilitation Act. 42 U.S.C. § 12202; 42 U.S.C. § 2000d-7. Their strategic decision to argue for State status and Eleventh Amendment immunity, however, was driven by the fact that the Eighth Circuit had already held that the ADA's abrogation of sovereign immunity is not valid for claims under Title II of the Act (an issue this Court declined to reach last Term in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001)). *See Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999). In light of the tenuousness of their claim to "Statehood" and this Court's very recent decision in *Garrett* dismissing the writ of certiorari as improvidently granted to the extent it raised the Eleventh Amendment issue under Title II, petitioners apparently decided the never-before-raised *Newport* issue had a better chance of interesting this Court.

> We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause ... or § 5 of the Fourteenth Amendment.... Petitioners raise this question in their brief, ... but it was addressed by neither the District Court nor the Court of Appeals, where petitioners raised only the *Gregory* plain-statement issue. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970) (citations omitted). See also *Dothard v. Rawlinson*, 433 U.S. 321, 323, n. 1 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927). We decline to do so here.

The same result should obtain here. Petitioners' failure to present the issue below has deprived this Court of the benefit of the lower courts' views on the question. Moreover, because the Eighth Circuit did not even implicitly decide the *Newport* issue, leaving its ruling intact will not establish or perpetuate a precedent one way or the other on the question.[17] Given petitioners' default and the lower courts' silence, there is no need for this Court to decide the issue.[18]

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[17] At least one district court in the Eighth Circuit has already held that the Eighth Circuit's decision in this case leaves open the question whether punitive damages may be imposed on a municipality. That court then went on to decide the issue adversely to the punitive damages claimant. *Schultzen v. Woodbury Central Community School District*, 2002 WL 262057 (D. Iowa Feb. 22, 2002).

[18] Ironically, in *Newport* itself, the Court had to consider whether the issue of municipal immunity from punitive damages had been waived by the city's failure to object to a jury instruction. This Court reached the issue, *but only because it had been presented to and decided by both the district court (in a motion for new trial) and the court of appeals*. 453 U.S. at 255-56; *accord, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (reaching city's claim that municipal liability had not been

(*Footnote continued*)

B. The *Newport* Presumption Against Subjecting Governmental Entities to Punitive Damages Does Not Apply to Title II or Section 504.

In *Newport*, this Court held that municipal governments are "immune from punitive damages under 42 U.S.C. § 1983." 453 U.S. at 271. The "immunity" recognized by *Newport*, however, is unlike Eleventh Amendment immunity in that it is not constitutionally based and may be overcome by congressional enactment. As this Court recently explained, the doctrine is no more than a "presumption against imposition of punitive damages on governmental entities" (including both municipalities and States). *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000). As such, the presumption is trumped by clearly expressed congressional intent. *Id.* at 787.

Here, a clear expression of congressional purpose exists not only in the form of Congress' stated intent in Title II to provide a "full panoply of remedies" against public entities (*see supra* pp. 11-13), but also, even more pointedly, in provisions applicable to both the ADA and the Rehabilitation Act that make clear Congress' intent *not* to provide governmental entities with a general immunity against the forms of remedies available against private actors.

The Rehabilitation Act Amendments of 1986 did more than simply attempt to abrogate State sovereign immunity against private actions brought to enforce Section 504 of the Rehabilitation Act. They went on to provide specifically that the full range of relief available against private defendants (as well as against public entities other than States) could be obtained in an action against a State:

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established despite arguable failure to make proper objection to jury instruction, where issue had been presented to and decided by both district court and court of appeals). Petitioners did not preserve the *Newport* issue here in a comparable manner—or in any manner.

> In a suit against a State for a violation of a statute referred to in paragraph (1) [including Section 504 of the Rehabilitation Act], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2). When Congress enacted the ADA in 1990, it included almost identical language in Section 502 of the Act (42 U.S.C. § 12202):

> In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

These provisions demonstrate Congress' intent to override any doctrines—such as the *Newport* rule—that might otherwise suggest that remedies available against a private defendant under the ADA or Section 504 of the Rehabilitation Act should be denied simply because a defendant is a government entity. And because (as demonstrated above) punitive damages are generally available for violations of Section 504 and Title II, both the Rehabilitation Act Amendments and the ADA unmistakably reflect congressional intent that punitive remedies also be available against governmental entities, thus directly overcoming the *Newport* presumption.[19]

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[19] The unsettled issue of the validity of the abrogation of Eleventh Amendment immunity for violations of Section 504 and Title II has no bearing on the significance of the relevant statutory provisions for present purposes. The only issue under *Newport* and *Vermont Agency* is whether Congress has manifested an intent to overcome the presumption that punitive damages are unavailable against governmental entities. Regardless of whether they suffice to overcome Eleventh Amendment immunity, 42 U.S.C. §§ 2000d-7 and 12202 are clear expressions of congressional in-

(*Footnote continued*)

Although 42 U.S.C. §§ 2000d-7(a)(2) and 12202 expressly provide only that *State* governmental entities are subject to the same remedies as private entities or other public entities (*see Lane v. Peña*, 518 U.S. at 199), the statutes dispel any presumption against the availability of punitive damages against municipalities as well, for two reasons. First, since *Vermont Agency* holds that the *Newport* presumption applies to both State and local governmental entities, by clearly subjecting State government entities to the full range of remedies, the statutes effectively overcome the *Newport* presumption that governmental entities in general have a special protection from punitive damages. Second, it would make no sense for Congress to subject States but not municipalities to punitive damages, because the legislative history of the ADA demonstrates that municipal governments have been the worst offenders in depriving people with disabilities of equal access to government services. *See Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001); *see also Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (cataloging history of discrimination by State and local governments compiled as part of ADA's legislative history).

Again, the contrast between the Title II remedy and the terms of the Civil Rights Act of 1991 helps to confirm that the presumption under the ADA is that governmental entities have no special exemption from available remedies unless Congress so specifies. In permitting, for the first time, awards of punitive damages for employment discrimination under Section 501 of the Rehabilitation Act and Title I of the ADA, the 1991 Act expressly exempted governmental entities. 42 U.S.C. § 1981a(b)(1). Congress' action reflects its understanding that, under 42 U.S.C. §§ 2000d-7(a)(2) & 12202,

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tent with respect to the availability of remedies against governmental entities. *See Garrett*, 531 U.S. at 363-64 (recognizing 42 U.S.C. § 12202 as an unequivocal expression of congressional intent); *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

such awards would presumptively be available against government entities absent express language exempting them.

C. Public Policy Supports Awards of Punitive Damages Against Municipalities under Title II and Section 504.

Even where the *Newport* presumption would otherwise apply, it may be overcome if the public policy concerns underlying it are outweighed by other policy considerations indicating a need for a punitive damages remedy under the particular statutory scheme at issue. *See Newport*, 453 U.S. at 266. Here, those policy concerns strongly support the availability of punitive damages against municipal governments.

Newport recognized the important role that punitive damages under 42 U.S.C. § 1983 play in deterring official misconduct. 453 U.S. at 268. Critical to the Court's decision not to permit such damages against governmental entities was its view that the "more effective" deterrent was the availability under Section 1983 of punitive damages directly against the particular officials who engaged in misconduct. *Id.* at 270. As the Court stated, "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations." *Id.* at 269; *see also Smith v. Wade*, 461 U.S. at 36 n.5 (emphasizing the importance of this rationale to the holding in *Newport*).

Given that both the ADA and the Rehabilitation Act are aimed at *eliminating* discrimination against people with disabilities in the provision of public services by State and local governments, the importance of deterrence under those statutes is at least as critical as it is under Section 1983. Unlike Section 1983, however, Title II of the ADA and Section 505(a)(2) of the Rehabilitation Act have been held not to provide remedies directly against offending officials in their personal capacities. *See Garcia v. S.U.N.Y. Health Sciences*

Center, 280 F.3d at 107 ("Insofar as Garcia is suing the individual defendants in their individual capacities, neither Title II nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials.") (collecting cases). Because the ostensibly "more effective" deterrent is apparently unavailable under Title II and Section 504, these statutes (unlike Section 1983, which was at issue in *Newport*) must depend for their deterrent effect on the remedies they provide directly against the entities to which they apply. Foreclosing punitive damages would materially interfere with the statutes' goal of making violation more costly than compliance.

Moreover, the countervailing policy concern that the Court found decisive in *City of Newport*—namely, the undesirability of penalizing innocent taxpayers for acts of misconduct by public officials from which the taxpayers have derived no benefit, *see* 453 U.S. at 266, 270—is largely absent here. The affirmative obligations imposed on public entities by Title II and Section 504 often have costs attached: modifying facilities, acquiring appropriate vehicles and other equipment, and training personnel so that people with disabilities are not denied the full benefits of public programs and services.[20] Unlike other civil rights statutes, violations of Title II will frequently stand to benefit taxpayers (at least in the short term) to some degree. The cost of compliance will likely exceed the costs that may be imposed in the few instances when a plaintiff sues for a violation and is able to establish that he has suffered actual damages.[21]

[20] As Arlene Mayerson, one of the architects of the ADA, has put it, "access can often cost money." Mayerson & Yee, *The ADA and Models of Equality*, 62 Ohio St. L.J. 535, 541 (2001). As the ADA's legislative history reflects, the enacting Congress recognized that "the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative." H.R. Rep. No. 101-485(III), at 50 (1990).

[21] Moreover, injunctive relief, which could directly prevent future violations, may not be available to plaintiffs who cannot establish a likelihood that they will be subjected to the same unlawful conditions in the future. Here, for example, respondent Gorman's injuries resulted from his treatment following an arrest—events that this Court's decisions suggest would be insufficient to provide him Article III standing to seek prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *see, e.g., Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001) (plaintiffs lacked standing to seek injunctive relief concerning inaccessibility of courthouse in absence of evidence they were likely to visit it again).

(*Footnote continued*)

To the extent such occasional damages awards fall short of the costs of actual compliance, they may be viewed by local governments as an acceptable cost of doing business, and taxpayers may benefit from reduced government expenditures attributable to ongoing failures to bring local government services into compliance with the Act. Similarly, taxpayers derive a windfall when, as in this case, local governments receive federal funding for many years without complying with their obligations under Section 504. Thus, unlike the situation in many Section 1983 lawsuits such as *Newport*, denying punitive damages will tend to under-deter violations significantly. Conversely, awarding them in appropriate cases, far from unfairly penalizing innocent taxpayers, will help to ensure that local government constituents do not benefit from their governments' unlawful conduct.

Newport's basic concerns thus have no application here, even if the Court entertains the *Newport* issue, now being raised in this Court for the first time in this 10-year-old litigation. Congress' clear intention to provide Title II plaintiffs with the full panoply of remedies, coupled with the important deterrent role punitive damages may play in advancing the sweeping policies of the ADA, compel rejection of petitioners' arguments that they should be insulated against punitive damages regardless of the nature of their conduct.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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March 29, 2002

Supreme Court, U.S.
FILED
FEB 27 2002
CLERK

(9)

No. 01-682

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), provides that "[n]o otherwise qualified individual with a disability" shall, "solely by reason of" the disability, be "excluded from the participation in," or "denied the benefits of," or "subjected to discrimination under," any public "program or activity" that receives federal financial assistance. Section 202 of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, prohibits the same conduct, but applies more generally to any public program, activity, or service regardless of the receipt of federal funds. The question presented in this case is:

Whether punitive damages may be awarded against a municipal government in an implied private cause of action brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b), petitioner Kay Barnes states that the other parties in the court of appeals were the following defendants named in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri: Dr. Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill, and Dennis C. Eckold. Although the Eighth Circuit's caption also lists as defendants Richard Easley, in his official capacity as Chief of Police of the Kansas City, Missouri, Police Department, and Neil Becker, in his official capacity as a member of the Kansas City Police Department, both were in fact dismissed from the case by the trial court prior to the entry of judgment. See note 11, *infra*. In this Court, the petitioners in addition to Commissioner Barnes are Commissioner Daniels-Young, Commissioner Eckold, and Commissioner Karl Zobrist (who has succeeded to the office previously held by Jeffrey J. Simon, see S. Ct. Rule 35.3), all in their official capacities. Commissioner Mulvihill resigned from the Board of Police Commissioners effective on May 26, 2001; his successor has not yet been named, but will become a petitioner once he or she takes office. S. Ct. Rule 35.3.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 257 F.3d 738. The order denying rehearing en banc (Bowman and Loken, JJ., dissenting) and panel rehearing (Pet. App. 52a) is unreported. A previous opinion of the court of appeals (*id.* at 35a-51a) is reported at 152 F.3d 907. The opinion of the district court vacating the punitive damages award (Pet. App. 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2001, and rehearing was denied on August 20, 2001 (Pet. App. 52a). The petition for a writ of certiorari was timely filed on November 8, 2001, and granted on January 11, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides in part: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. Art. I, § 8.

Pertinent provisions of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Civil Rights Act of 1991, all as amended, and of the relevant federal regulations, are set forth in an appendix to this brief (App., *infra*, 1a-10a).

STATEMENT

This case arises out of the arrest of a disabled nightclub patron (respondent Jeffrey Gorman) who got into an altercation with a bar employee, was forcibly ejected from the premises, and then, once outside, refused to leave when asked by off-duty police officers. After being placed under arrest for trespassing, Gorman,

who is paraplegic and confined to a wheelchair, was transported to the police station in a van that was equipped with a bench but not with wheelchair locks. Despite precautions taken to secure him, Gorman fell from the bench during the trip after he loosened his seatbelt and another belt that had been used to secure him somehow came undone. On the basis of injuries he claimed to have sustained in the fall, Gorman sued several members of the Kansas City Police Department and Board of Police Commissioners, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132.

The jury awarded Gorman more than $1 million in compensatory damages. It also awarded him punitive damages of $1.2 million. Although the district court vacated the $1.2 million penalty as legally impermissible, the court of appeals reversed. In deciding that punitive damages could be recovered from a municipal government under these provisions of the federal civil rights laws, the Eighth Circuit expressed "sympath[y]" with the contrary view held by the Sixth Circuit, but deemed itself "compel[led]" by *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), to "part[] ways" and — albeit "not with great satisfaction" – to recognize an implied judicial remedy of punitive damages. Pet. App. 12a-3a, 15a-16a.

A. The Statutory And Regulatory Framework

1. Although this case involves punitive damages claims brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, those two provisions are part of a series of closely related civil rights statutes that originated in Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000d *et seq.*). Title VI provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Title VI also directs every federal "department or agency

which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract" to "effectuate" this non-discrimination command "by issuing rules, regulations, or orders of general applicability" that are "consistent with achievement of the objectives of the statute authorizing the financial assistance." *Id.* § 2000d-1. "Compliance with any requirement adopted pursuant to" Section 2000d-1, moreover, "may be effected" by, among other things, "the termination of or refusal to grant or continue assistance under such program or activity," after there has been "an express finding on the record" of noncompliance by a recipient of federal monies in an administrative proceeding. *Ibid.*

Eight years after enacting Title VI, Congress enacted Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235 (codified at 20 U.S.C. § 1681 *et seq.*). In language closely paralleling Title VI, Title IX prohibits educational activities and programs that receive federal funding from discriminating against, or denying their benefits to, individuals "on the basis of sex." 20 U.S.C. § 1681(a). Title IX also contains a provision relating to "federal administrative enforcement" of that non-discrimination command that is patterned after Title VI's enforcement provision. See 20 U.S.C. § 1682 (authorizing "the termination of or refusal to grant or continue assistance under such program or activity" in the case of a finding of noncompliance by a recipient of federal funding).

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of vocational and other rehabilitation services for the disabled and – like Title VI and Title IX – imposes certain conditions on the recipients of federal funds. Among other things, the Act (in § 504) bars discrimination against persons with disabilities under federal grants and programs and (in § 501) places certain obligations on federal agencies with respect to the employment of the disabled. See 29 U.S.C. §§ 791, 794(a). In language mirroring Title VI and Title IX, Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability,

be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

In 1978, Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub. L. No. 95-602, tit. I, § 120(a), 92 Stat. 2982. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. § 794a(a)(2).

In enacting Title VI, Title IX, and Section 504 of the Rehabilitation Act, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. 677, 704-05 (1979)) and Title VI (*Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)).

In 1990, Congress passed the Americans with Disabilities Act ("ADA"), Pub. L. No. 101-336, 104 Stat. 327. In familiar language, Section 202 of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 203 of the ADA, in turn, specifies that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133.

Following enactment of the ADA, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 102, 105 Stat. 1072. Among other things, the 1991 Act created a limited right to recover punitive damages (subject to specified monetary caps) in certain actions brought under Section 501 of the Rehabilitation

Act, 29 U.S.C. § 791, and Section 102 of ADA, 42 U.S.C. § 12112. See 42 U.S.C. § 1981a(a)(2). The punitive damages provision does *not* apply to Section 504 of the Rehabilitation Act or to Section 202 of the ADA. The 1991 Act also provides that the newly authorized punitive damages remedy may not be recovered from any "government, government agency or political subdivision." *Id.* § 1981a(b)(1).

2. Pursuant to Congress's mandate in the 1978 Act, the Department of Justice has issued regulations implementing Section 504 of the Rehabilitation Act with respect to local law enforcement agencies (such as the Board of Police Commissioners of Kansas City) and other recipients of federal financial assistance from the Justice Department. Those regulations are the same in all relevant respects today as they were when respondent was arrested. See 28 C.F.R. §§ 42.501-42.505, 42.530 (1992, 2001). Among other things, they require recipients to include an assurance of compliance with Section 504 and with the regulations themselves in every application for federal assistance (*id.* § 42.504(a)); to evaluate and modify their policies and practices that do not comply with these statutory and regulatory obligations (*id.* § 42.505(c)(1)); to provide an opportunity for interested persons to participate in this process of self-evaluation (*ibid.*); to make available for public inspection, in certain circumstances, various self-evaluation documents (*id.* § 42.505(c)(2)); to designate a responsible employee to coordinate compliance (*id.* § 42.505(d)); and to adopt a grievance procedure (*id.* § 42.505(e)).

In a provision entitled "Remedial action," the regulations further provide that, if the Justice Department "finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or [these regulations], the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination." *Id.* § 42.505(a). The regulations also require each written assurance signed by a funding recipient to "include provisions giving notice that the United States has a right to seek judicial enforcement of section 504 and the assurance." *Id.* § 42.504(a).

The regulations also provide that, with certain exceptions not relevant here, the "procedural provisions" of the regulations "applicable to title VI of the Civil Rights Act of 1964 (28 CFR 42.106-42.110) apply" to recipients under Section 504 of the Rehabilitation Act. Today as in 1992, the Justice Department's procedural regulations relating to Title VI set forth certain measures "for effecting compliance" with the regulatory requirements. 28 C.F.R. § 42.108 (1992, 2001). Among other things, the regulations state that "[if] there appears to be a failure or threatened failure to comply" and such failure "cannot be corrected by informal means," the "responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance." *Id.* § 42.108(a). Moreover, "[s]uch other means include, but are not limited to: (1) Appropriate proceedings brought by the Department to enforce * * * any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law." *Id.* § 42.108(a)(1). In a subsection entitled "noncompliance with assurance requirement," the regulation further states that if an applicant for federal funding (or a recipient) "fails or refuses to furnish an assurance" of compliance, or "fails or refuses to comply with the provisions of the assurance it has furnished," federal assistance "may be suspended, terminated, or refused." *Id.* § 42.108(b).[1] The Department of Justice has also issued regulations that implement Section 202 of the ADA, 42 U.S.C. § 12132. See 28 C.F.R. § 35.101 *et seq.* (1992, 2001).

[1] The Department's procedural regulations also provide that "[n]o action to effect compliance by any other means authorized by law shall be taken until: (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Attorney General, and (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance." 28 C.F.R. § 42.108(d) (1992, 2001).

B. The Events Underlying This Lawsuit

Respondent Jeffrey Gorman was rendered paraplegic by an auto accident in 1988. Pet. App. 2a. On a Saturday night in May 1992, Gorman and a friend were out drinking at a country-and-western nightclub in Kansas City, Missouri, when they got into an argument with a bouncer. *Ibid.*; J.A. 56-57.[2] According to three off-duty police officers in the bar who were working as private security and who witnessed the altercation, Gorman screamed obscenities and acted belligerently. J.A. 40-41, 50-51, 56-57. As a result, Gorman was carried out of and forcibly expelled from the bar. Pet. App. 2a; J.A. 40. Outside, he approached several off-duty police officers in the hope that they would intercede. Pet. App. 2a. The officers, several of whom had witnessed the fight inside, instead told Gorman that he had to leave. *Id.* at 3a. When Gorman refused to move away from the bar's entrance, he was arrested for trespass. *Ibid.*; J.A. 57-58; Tr. 65.

Sometime thereafter, a police van arrived to transport Gorman to the station for booking. The van was driven by Officer Neil Becker, a police department veteran of nearly twenty years. Pet. App. 3a; J.A. 5-6. Gorman testified that, while waiting for the van, he told the off-duty officers that he had to go to the restroom to empty his full urine bag.[3] Pet. App. 3a; J.A. 5-6. The off-duty officers (whom Gorman sued in a separate lawsuit, which was

[2] As the court appeals correctly noted, "[a]lmost every element of what happened that night was contested by the defendants, whose testimony was that Gorman did not instruct the officers how to transport him, offered no input whatsoever, and was thoroughly drunk and belligerent." Pet. App. 3a n.2. Except where otherwise noted, we (like the court of appeals) present Gorman's version of events because he prevailed below. *Ibid.*

[3] "Gorman * * * lacks voluntary control over his lower torso and legs, including his bladder. His inability to steady himself with his abdominal muscles and legs confines him to a wheelchair specially designed to keep him upright. He must also wear a catheter attached to a urine bag around his waist * * *." Pet. App. 2a.

settled) told Gorman to wait until he got to the station. Pet. App. 3a.

The police van was equipped with a bench but lacked wheelchair locks, which would have permitted Gorman's transportation in his chair. Pet. App. 3a; J.A. 42. Gorman testified at trial that he told the officers that he was unable to stay upright without his wheelchair and could not ride in the van without risking a fall from the bench. Pet. App. 3a; J.A. 5-6.[4] Officer Becker, in contrast, testified that Gorman was antagonistic and uncooperative, and did not assist the officers in determining how best to transport him in the van. J.A. 34-36.[5]

The officers placed Gorman on the bench and used a seatbelt to strap him in. Pet. App. 3a. As an extra precaution, they also used Gorman's own belt to strap him to the wire mesh behind the bench to secure him in an upright position. *Ibid.*; J.A. 10. Gorman testified that the seatbelt lay across his already full urine bag. Pet. App. 3a; J.A. 9. According to Gorman, the officers loosened the seatbelt after he complained about it. Pet. App. 3a; Tr. 80-81. Kansas City police officers usually handcuff arrestees before transporting them. Tr. 363-64. In this case, however, Officer Becker did not handcuff Gorman, but instead allowed

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[4] Neither Officer Becker nor Officer William Warren, the off-duty police officer who helped secure Gorman in the van, recalled Gorman mentioning that he could not be transported in the van. J.A. 36, 61. According to Officer Warren, moreover, Gorman never mentioned a need for back support or the special wedged cushion from his wheelchair. J.A. 61.

[5] Officer Becker's testimony about Gorman's belligerence and lack of cooperation outside of the bar was confirmed by no fewer than four other off-duty police officers, including two of the three who testified about Gorman's belligerence *inside* the bar. J.A. 52, 56-57, 59, 60, 62-64. Moreover, Sergeant Joellen Hudson, a member of the Kansas City Police Department since 1979 and the senior-ranking off-duty officer at the scene, discussed Gorman's transportation with Officer Becker and advised him that, given Gorman's attitude and belligerence, transporting Gorman in a police car would not be safe. Tr. 597, 595; J.A. 63-64

Gorman to use his hands and arms for additional support. J.A. 35. Officer Becker testified that Gorman was securely belted when the van left the scene and he assumed the seatbelt would prevent Gorman from falling forward. J.A. 36-37.

Officer Becker, the only on-duty officer, then drove the van to the police station. Pet. App. 3a; Tr. 330. At some point during the ride, Gorman released his seatbelt out of concern over the pressure it was placing on the urine bag. Pet. App. 3a; J.A. 20. Eventually, the other belt also came undone and Gorman fell to the floor, causing the urine bag to rupture. Pet. App. 3a-4a; Tr. 80-81, 83. Officer Becker stopped the van but was unable to lift Gorman by himself, so he fastened Gorman to a support in the back of the van for the duration of the trip. Pet. App. 4a; Tr. 82, 349. After arriving at the station, Gorman was booked, processed, and released. Pet. App. 4a. He was subsequently convicted of misdemeanor trespass. *Ibid.*

C. The Proceedings Below

1. On May 30, 1995, Gorman filed an action in the United States District Court for the Western District of Missouri alleging that, "by reason of" his disability, he had been "excluded from participation in" or "denied the benefits of" the "programs" or "activities" of the Kansas City Police Department, in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the ADA, 42 U.S.C. § 12132.[6] Gorman named as defendants Officer Becker, then-Chief of Police Steven Bishop, and various current or former members of the Board of Police Commissioners of Kansas City ("the Board"), including the Mayor of Kansas City, Missouri (who by virtue of that position

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[6] Gorman did not allege that he had been arrested because he was disabled or that he was otherwise "subjected to discrimination" by petitioners on the basis of his disability. His claim, instead, was that he had been "denied the benefits of" the public "service" of transporting arrestees, or had been "excluded from participation" in that "program," on the basis of his disability even though he was "otherwise qualified" to receive those benefits or participate in that program.

automatically serves as a Member of the Board).[7] Gorman sought compensatory damages, alleging that, after his fall in the police van in May 1992, he began to have certain medical problems, including a bladder infection and shoulder and back pain. Pet. App. 4a; J.A. 13-14. He also sought punitive damages.

Following an initial dismissal by the district court (see *Gorman* v. *Bishop*, 919 F. Supp. 326 (W.D. Mo. 1996); *Gorman* v. *Bartch*, 925 F. Supp. 653 (W.D. Mo. 1996)), the court of appeals remanded the case for a trial of respondent's claims against petitioners – in their official capacity only. Pet. App. 35a-51a.[8] A trial was conducted on April 5-7, 1999. As noted above, the trial featured conflicting testimony about the underlying events and respondent's behavior before and after his ejection from the

[7] The Board members named in the original complaint were Mayor Emanuel Cleaver II, John Dillingham, Jack Headley, Jacqueline Paul, Balius Tate, Donna Boley, and Albert Riederer. Resp. C.A. App. 25. In an amended complaint filed on November 6, 1995, respondent added defendants Stacey Daniels[-Young] and James F. Ralls, Jr., and omitted defendant Riederer. Resp. C.A. App. 29; see also page ii, *supra* & note 11, *infra*.

[8] In so doing, the Eighth Circuit rejected petitioners' submission – which the district court had accepted – that the activities of law enforcement officers in making arrests in the field and transporting arrestees to the police station were not "services," "programs," or "activities" that respondent had been "qualified" for but "denied the benefit of" within the meaning of the Rehabilitation Act or the ADA. Pet. App. 40a-46a. Nevertheless, the court of appeals acknowledged that, at the time of Gorman's arrest in 1992, "[t]here were no cases addressing [the ADA's] possible application to government agencies like police departments or to the transportation of arrestees." *Id.* at 49a. For that and other reasons, the court concluded that "it cannot be said that reasonable police officials in May of 1992 would have known that the actions alleged" by Gorman "in respect to the transportation of a disabled arrestee were subject to, and in violation of," the Rehabilitation Act and the ADA. *Id.* at 50a. On that basis, the Eighth Circuit upheld the dismissal, on grounds of qualified immunity, of respondent's claims against the individual petitioners in their individual capacities. *Ibid.*

bar. There was also conflicting evidence about the extent of Gorman's injuries and their cause.[9]

Over the objection of petitioners, who maintained that punitive damages were unavailable as a matter of law, the trial court instructed the jury that it could award Gorman "punitive damages in order to punish the defendant[s] for some extraordinary misconduct" or to "deter the defendants and others for like conduct in the future." J.A. 72, 21-22; Tr. 614. The court also instructed the jury that, for purposes of assessing liability for punitive damages (but not in determining whether there was a violation of the Rehabilitation Act in the first place), the jury could consider whether petitioners had a "plan for compliance," or "provided training[] for compliance with" that statute "on or before May 31, 1992." J.A. 72.

The parties entered into a lengthy stipulation concerning the obligations imposed on petitioners by the Rehabilitation Act and the ADA as well as their implementing federal regulations. They stipulated that "from the effective date of the regulations implementing the Rehab[ilitation] Act of 1973, in 1981[,] the City of Kansas City, Missouri filed written assurances with the federal government that the policies and practices of the department would be operated in accordance with the Act," but between 1981 and the date of Gorman's arrest in May 1992 the Board "had no policy regarding that act." J.A. 42; see also *id.* at 69-70.[10] Over

[9] For example, one of Gorman's doctors concluded that Gorman's shoulder pain resulted from tendinitis caused by overuse of his shoulders. J.A. 19. As for Gorman's back pain, two police officers testified that they had witnessed at least one other incident in which Gorman had fallen out of his wheelchair. J.A. 53-54, 63. One officer testified that, about a month before his trespassing arrest, Gorman had been traveling 15-25 miles per hour on the downhill slope of a road when he lost control and was ejected from his wheelchair. Another officer testified that Gorman lost control while riding on the same road with a woman sitting on his lap. It is not clear whether these were the same incident.

[10] The stipulation also noted that during this time period the Police

petitioners' objection, the trial court permitted respondent's counsel to read to the jury various provisions of the Justice Department's regulations implementing the Rehabilitation Act, including those embodying the requirements mentioned in the stipulation. J.A. 43-45. With respect to the ADA, the court permitted respondent's counsel to say that it imposed obligations that were no less stringent than those imposed by Section 504 of the Rehabilitation Act and the regulations implementing the Rehabilitation Act. J.A. 50.

In closing argument, respondent's counsel repeatedly stressed that petitioners "took money from the federal government" and submitted affidavits every year attesting to their compliance with federal regulations but "had no plan and had no training." J.A. 65; see also *id.* at 67-68 (arguing that jury's verdict should not "sweep under the rug the 16 years they ignored the law. I hope someone will say, my goodness there is a price to pay."). Counsel also emphasized that the Justice Department had made an inquiry into petitioners' compliance with the Department's regulations under the Rehabilitation Act and ADA after receiving a complaint from respondent's sister. J.A. 66-67. The jury returned a verdict in respondent's favor, awarding him compensatory damages of $1,034,817.33 and punitive damages of $1,200,000. Pet. App. 4a.[11]

Department "did not formulate a plan or modify its policies or practices pursuant to the act," "has not made self-evaluation documents of a compliance plan available for public inspection pursuant to the act," has not "designated a responsible employee to coordinate compliance," has not "adopt[ed] a grievance procedure for discrimination complaints," and has not "provided an opportunity for interested persons * * * to participate in any self-evaluation process or submit comments to them." J.A. 42-43. See page 5, *supra*.

[11] At the close of Gorman's case, the trial court dismissed the claims against Police Chief Easley (the successor to Chief Bishop) and Officer Becker in their official capacities, thus leaving only the individual Board members as defendants. See Tr. 495-96; Resp. C.A. App. 45 (jury instruction explaining dismissal). The district court's judgment was

2. Relying (Pet. App. 24a-27a) on the Sixth Circuit's en banc decision in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996), the district court set aside the award of punitive damages. Pet. App. 21a-34a. Although "Congress amended portions of the Rehabilitation Act three times (including section 504 twice) and the ADA once," the district court explained, "at no time did Congress take steps to alter the consensus of judicial decisions" holding that punitive damages "were not available." *Id.* at 25a-27a. "'The only inference of congressional intent that can be drawn from the three pieces of legislation,'" the court concluded, "'is that Congress intended § 504 remedies to remain in status quo – *i.e.*, no punitive damages.'" *Id.* at 27a (quoting *Moreno*, 99 F.3d at 791).

3. A panel of the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1a-20a. Although the panel stated that it was "sympathetic" to the Sixth Circuit's view that punitive damages are unavailable under Section 504 (*id.* at 8a, 12a), and even acknowledged that the "concerns" of the Sixth Circuit were "hardly misplaced" (*id.* at 13a), it nevertheless ruled ("not with great satisfaction") that the Sixth Circuit's approach was "foreclosed by controlling precedent" (*id.* at 8a, 15a) – in particular, by *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992).

In *Franklin*, this Court had held that an implied right of action under Title IX supports a claim for "monetary damages." 503 U.S. at 63. As the Eighth Circuit read *Franklin*, there is a presumption that all "appropriate remedies" will be available in an implied cause of action, which can be overcome only if Congress "expressly limit[s] the remedies available." Pet. App. 11a-12a. In the court of appeals' view, because this Court had "long made clear that punitive damages are an integral part of the common

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entered against Mayor Cleaver and Commissioners Stacey Daniels-Young, Jeffrey J. Simon, Joseph J. Mulvihill and Dennis C. Eckold, all in their official capacities as members of the Board. While this case was on appeal, petitioner Kay Barnes succeeded Emanuel Cleaver II as Mayor of Kansas City and thus as a member of the Board.

law tradition and the judicial arsenal," punitive damages "fall within the panoply of remedies *usually available* to American courts." *Id.* at 10a (emphasis added) (citing *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991)). "Given an implied cause of action," the Eighth Circuit reasoned, *Franklin* "compels the conclusion" that a plaintiff may recover "all appropriate remedies, including punitive damages" – unless there is an "express congressional statement to the contrary." *Ibid.*

Unlike the Sixth Circuit – whose "methodology and conclusions" it explicitly rejected (Pet. App. 12a) – the Eighth Circuit could not discern the requisite congressional intent to foreclose a punitive damages remedy. The court recognized that its analysis "turns * * * on its head" Congress's understanding, evident in the "text and history of the 1991 Act" (which added a limited punitive damages remedy), that in so doing Congress "intended to expand, and not to contract, the available remedies" under the Rehabilitation Act and ADA, and "considered the new language necessary to create a punitive damages remedy under the acts." *Id.* at 15a. But that evidence was not sufficiently "express" to persuade the court of appeals that Congress intended to preclude resort to punitive damages as a remedy in cases not covered by the narrow 1991 provision.

The court of appeals then remanded the case for a determination (purportedly under *Franklin*) whether an award of punitive damages was "appropriate" in this "specific case." Pet. App. 16a. Again, the panel flatly disagreed with the Sixth Circuit. As a *categorical* matter, that court had held that, "given the legislative and judicial backdrop" and a number of policy considerations, punitive damages are "not 'appropriate' as required by *Franklin*" in *any* action brought under Section 504 of the Rehabilitation Act. *Id.* at 16 n.10 (citing *Moreno*, 99 F.3d at 791-92). In the Eighth Circuit's view, the question whether a remedy is "appropriate" under *Franklin* is a case-specific (not statute-specific) inquiry. Pet. App. 16a n.10. The court therefore remanded for consideration of whether the punitive award in this case was supported by sufficient evidence and not constitutionally excessive.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Circuit in this case reluctantly upheld the availability of punitive damages under Section 504 of the Rehabilitation Act and Section 202 of the ADA. Reluctance, in fact, scarcely captures the court of appeals' evident discomfort: The court acknowledged that strong evidence pointed in the opposite direction and was "sympathetic" to the Sixth Circuit's contrary holding in *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (1996) (en banc), a decision animated (the Eighth Circuit noted) by concerns that were "hardly misplaced." Pet. App. 12a, 13a. In the Eighth Circuit's view, however, it was "compel[led]" to overlook the conflicting evidence of congressional intent and to sustain the availability of punitive damages because of this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992). Pet. App. 10a, 12a. According to the Eighth Circuit, *Franklin* created a "one-way ratchet" under which, "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." *Id.* at 14a (emphases added). Moreover, unless Congress "*expressly limit[s]* the remedies available" (*id.* at 12a (emphasis added)) – which is no small feat given that the private right of action is implied (as well as subsequently defined by the judiciary) – courts are required to ignore other, telling evidence of congressional intent.

If affirmed, the Eighth Circuit's interpretation of *Franklin* – and its conclusion that punitive damages are available in this case – would go far towards ensuring that "the most questionable of private rights will also be the most expansively remediable." *Franklin*, 503 U.S. at 78 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring in the judgment). There is, however, absolutely no basis for that result.

I. The court of appeals' animating premise – that Congress must be *presumed* to have made punitive damages available in this setting – ignored two fundamental principles that establish exactly the *opposite* presumption. First, where (as here) Congress

acts pursuant to its Spending Clause powers – and thus imposes on grant recipients obligations that are contractual in nature – Congress must clearly state its intent to authorize a particular remedy in the event of non-compliance, whether in punitive damages or otherwise. Second, and independently, there is a traditional immunity of municipal governments from liability for punitive damages, which this Court recognized in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). Taken even singly, but especially together, these two principles – which are the backdrop against which Congress acted – make clear that only the most compelling evidence could overcome the presumption that Congress did *not* intend to permit punitive damages in an implied private cause of action asserted against a municipal government under Section 504 of the Rehabilitation Act and under Section 202 of the ADA. The Eighth Circuit's insistence on looking through the opposite end of the telescope was based on a profoundly misguided interpretation of this Court's decision in *Franklin*.

II. Far from overcoming the presumption against the availability of punitive damages, the text, structure, and history of Section 504 and Section 202 confirm that punitive damages are completely inappropriate. Both provisions trace their remedies to Title VI of the Civil Rights Act of 1964. But while Title VI has been construed to permit a private right of action for *compensatory* relief, its elaborate procedural protections – which ensure that the draconian remedy of a fund cut-off is imposed only a last resort, and only after an exacting series of due process measures have been exhausted – cannot be squared with the imposition of punitive damages through private litigation. What is more, when Section 504 was amended in 1978 to adopt the remedies available under Title VI, no court had ever suggested that punitive damages might be one of the options – and there is every reason to presume that Congress embraced that understanding when it adopted the Title VI scheme. Finally, in 1991, Congress *did* add – expressly – a punitive damages remedy to both the Rehabilitation Act and the ADA; significantly, however, Congress confined that remedy to *other* portions of the

statutes (not Section 504 or Section 202), and it expressly exempted governmental entities (like petitioners) from the ambit of the new provisions. As the Eighth Circuit acknowledged (Pet. App. 15a), Congress plainly believed that it was "expand[ing], and not * * * contract[ing] the available remedies" when it passed the 1991 legislation. The Eighth Circuit's contrary view makes it hard to see why Congress bothered.

ARGUMENT

I. Contrary To The Eighth Circuit's View, Only The Clearest Evidence Can Overcome The Presumption That Punitive Damages Are *Not* Available In This Case

Two fundamental principles of law – which are the backdrop against which Congress legislated – confirm that punitive damages are presumptively *not* available under Section 504 of the Rehabilitation Act and Section 202 of the ADA, at least in an action against a municipal government. The first and broader principle, reflected in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and subsequent cases, demands special clarity when Congress places conditions on the recipients of federal funding pursuant to its Spending Clause powers. The second principle, reflected in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), is the historical immunity from punitive damages enjoyed since time immemorial by municipal governments. In light of these background principles, only the clearest evidence could overcome the presumption that punitive damages are *not* available in this case. The Eighth Circuit's contrary presumption rests on a fundamental misreading of this Court's decision in *Franklin*.

A. When Congress Acts Pursuant To The Spending Clause, It Must Clearly Express Any Conditions Imposed On The Recipients Of Federal Funding – Including The Nature Of Any Penalty That May Be Exacted In The Event Of Non-Compliance

The Eighth Circuit read *Franklin* to create a presumption that punitive damages are *available* under Sections 504 and 202 unless

Congress *unambiguously foreclosed* punitive damages. But, given that Section 504 is Spending Clause legislation and that Congress has instructed that Section 202's remedies be the same as those under Section 504, the correct presumption was exactly the opposite: punitive damages are *unavailable* under Sections 504 and 202 unless Congress *unambiguously provided for* punitive damages.

In *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981), the Court wrote:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

In light of *Pennhurst*'s clear-statement principle, it is questionable whether this Court ever should have construed Spending Clause legislation (such as Title VI, Title IX, and the Rehabilitation Act) to allow implied private rights of action. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 685 (1999) (Kennedy, J., dissenting) ("Whether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question."). No Justice, however, has proposed to reconsider the implied private rights of action that have already been recognized by this Court's decisions. See *Franklin*, 503 U.S. at 65, 72-73; *id.* at 77-78 (Scalia, J., concurring in the judgment); *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1516, 1520 (2001).

The Court's approach, instead, has been to cast a skeptical eye on, and to insist that fund recipients have clear advance notice of, any *expansion* of the implied private rights of action previously recognized under Spending Clause legislation. Both *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis* v. *Monroe County Board of Education*, *supra*, are particularly instructive.

In *Gebser*, the Court was asked to expand Title IX's implied private right of action – first recognized in *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), and further refined in *Franklin* – to impose liability on a school district based on theories of *respondeat superior* or constructive notice. Although the defendant in *Gebser* was a local school district rather than a State, the Court unhesitatingly applied the principles of *Pennhurst* that constrain the construction of Spending Clause legislation. Title IX and the cognate Title VI, the Court wrote, "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." 524 U.S. at 286. The Court elaborated:

> Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, U. S. Const., Art. I, § 8, cl. 1, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring that "the receiving entity of federal funds [has] notice that it will be liable for a monetary award."

Id. at 287 (citations omitted).

Because of those principles, the Court held that neither a *respondeat superior* theory nor a constructive notice theory could be used to impose liability on a fund recipient. Although the underlying conduct – sexual harassment of a student by a teacher – was unquestionably discrimination forbidden by Title IX, the *remedies* available for such conduct were constrained by *Pennhurst* and by the requirement that fund recipients be subjected to only those conditions – including liability – of which they had adequate notice. See 524 U.S. at 284 ("We made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie."); *id.* at 287 ("Title IX's contractual nature has implications for our construction of the scope of available remedies.").

Davis was another Title IX case involving allegations of sexual harassment, but it was a student rather than a teacher who was the alleged wrongdoer. Rather than hold the school district liable vicariously, the plaintiff "attempt[ed] to hold the [School] Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools." 526 U.S. at 641. Although the Court divided sharply over whether the circumstances of that case *constituted* sufficiently unambiguous notice to the School Board that it might be held liable for deliberate indifference to known sexual harassment (and over what constitutes sexual harassment in the context of adolescents' behavior), *all nine Justices agreed that the available remedies under Title IX must be shaped by the notice requirement.* "Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' power under the Spending Clause," the majority wrote, "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Id.* at 640. The majority proceeded in the same paragraph to quote *Pennhurst*'s contract analogy, its insistence that Congress speak with a clear voice, and its recognition that there can be no knowing acceptance of legislative conditions of which the recipient is not made aware. *Ibid.* And, although *Davis* concerned the scope of proscribed conduct and not the scope of remedies, the majority repeatedly returned to *Pennhurst*'s notice requirement in delimiting the scope of Title IX's private right of action. *Id.* at 641-42, 649-50.

An adamant dissent agreed that the nature of Title IX as Spending Clause legislation was key to deciding the case, but took the majority's analysis further. First, although the defendant was a unit of local government and not a State, the dissent noted the important federalism interests served by the requirement that conditions imposed by Spending Clause legislation be unambiguous. 526 U.S. at 654-55 (Kennedy, J., dissenting); see also *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 122 S. Ct. 934, 939 (2002). Second, the dissent (echoing *Gebser*) emphasized that the *scope* of liability is within the clear-notice rule: "Without doubt, the scope of potential damages liability is one of the most significant factors

a school would consider in deciding whether to accept federal funds." 526 U.S. at 656. Third, the dissent synthesized those principles by observing that "the majority must establish that Congress gave grant recipients clear and unambiguous notice that they would be liable in money damages for failure to remedy discriminatory acts of their students." *Id.* at 657.[12] Fourth, the dissent complained that a "multifactored balancing test is a far cry from the clarity we demand of Spending Clause legislation." *Id.* at 675; see also *id.* at 685 (Congress must "dictate[]" a condition on funding "in unambiguous terms"); cf. Pet. App. 16a (Eighth Circuit's recognition of many factors that will have to be applied on remand to determine whether punitive damages were justified in this case).

The principles recognized by the Court in *Pennhurst* and *Gebser*, and by all nine Justices in *Davis*, make it unthinkable that the silence the Eighth Circuit perceived in Section 504 should be construed to impose punitive damages on those who have accepted federal funds.[13] Congress must state all conditions on grantees' receipt of federal funds "unambiguously" so that they are ""knowingly[] cognizant of the consequences of their participation." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst*, 451 U.S. at 17). Nothing in the "contract" between the Federal Government and the Board of Police

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[12] The dissent argued that "[t]he majority does not carry these burdens," 526 U.S. at 657, whereas the majority contended that it had carried them. The disagreement pertained not to the clear-statement requirement, but to the clarity with which fund recipients' obligations and liabilities had been laid out.

[13] As noted above, although Section 202 of the ADA is not Spending Clause legislation, Congress dictated in Section 203 of the ADA, 42 U.S.C. § 12133, that the remedies for a violation of Section 202 be exactly the same as the remedies for a violation of Section 504 of the Rehabilitation Act. Therefore, if Spending Clause jurisprudence (or anything else) requires that punitive damages be unavailable under Section 504, then Section 203 requires that punitive damages be unavailable under Section 202.

Commissioners of Kansas City, Missouri, gave notice that punitive damages might be a "consequence of [the Board's] participation" in federal funding.[14]

Nor would ordinary principles of contract law have alerted the Board that it was exposing itself to the risk of punitive damages. The common law rule is that punitive damages are *not* a permissible remedy for breach of contract. See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981); see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1881) ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.").[15] For the Executive Branch to offer the Board of Police Commissioners federal funds on the statutory condition that it not discriminate, without a word about punitive damages, and the Judicial Branch then to say that the Police Department thereby promised to be subject not just to "remedial relief" (*J.I. Case Co.* v. *Borak*, 377 U.S. 426, 435 (1964), *quoted in Franklin*, 503 U.S. at 68) but also to *punishment*, is nothing

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[14] It is especially difficult to see how petitioners could have understood in 1992 that a condition placed on the Board's receipt of federal funds was the potential liability for punitive damages, since (1) it was "not until 1994" (several years after respondent's arrest) that there was even "a single case where punitive damages were awarded under § 504" (*Moreno*, 99 F.3d at 790), and (2) it was unclear that the relevant statutes even applied in this situation, as the court of appeals explained in upholding qualified immunity in a prior appeal (Pet. App. 46a-50a). See also note 8, *supra*.

[15] In fact, under standard principles of contract law the parties may include a provision for liquidated damages in the event of a default, but the amount must be "reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981). "A term fixing unreasonably large liquidated damages is *unenforceable* on grounds of public policy *as a penalty*." *Ibid.* (emphasis added).

less than a bait-and-switch. This Court's Spending Clause jurisprudence forbids such a conclusion.[16]

B. Congress Also Acted Against The Backdrop Of A Well-Established Immunity Of Municipal Governments Against Punitive Damages

In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court considered whether a municipal government may be held liable for punitive damages in an action brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. In holding that Congress did not intend to authorize punitive damages, the Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive liability. 453 U.S. at 259-63. The Court also examined "whether considerations of public policy dictate" recognition of a punitive damages remedy against municipalities despite that longstanding immunity, and concluded that a punitive damages remedy in this setting would be inappropriate. *Id.* at 267-71. The background principle of governmental immunity recognized in *City of Newport* is no less informative in discerning Congress's intent concerning the availability of punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA.

City of Newport canvassed the early case law and demonstrated that in 1871, when Congress enacted Section 1983, "the

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[16] Even when it acts pursuant to grants of authority other than the Spending Clause, Congress ordinarily must speak clearly when it wishes to impose punishment. See, *e.g.*, *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959) ("The law is settled that penal statutes are to be strictly construed, and that one is not to be subject to a penalty unless the words of the statute plainly impose it.") (internal quotations and citations omitted); *Elliott* v. *Railroad Co.*, 99 U.S. 573, 576 (1878) ("Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced."); cf. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.") (internal quotations omitted).

immunity of a municipal corporation from punitive damages at common law was not open to serious question." 453 U.S. at 259. Moreover, more than a century later, when *City of Newport* was decided, "[t]he general rule" in American jurisdictions remained that "no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21. This Court's description of the state of the law in 1981, when *City of Newport* was decided, obviously applies with equal force to the legal landscape in 1978, when Congress amended the Rehabilitation Act to include an express remedies provision, and in 1964, when Title VI was passed. Nor had anything changed by 1990, when Congress enacted the ADA. Throughout this entire period, and continuing until today, American jurisdictions have consistently recognized the immunity of municipal governments from punitive damages.

More recently, the Court relied on this background principle of immunity in interpreting the False Claims Act (FCA), which imposes "treble damages and a civil penalty of up to $10,000 per claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (citing 31 U.S.C. § 3729(a)). Invoking "the presumption against imposition of punitive damages on governmental entities" recognized in *City of Newport*, this Court held that States and state agencies are not "persons" subject to suit under the FCA. *Id.* at 784-85. It also rejected the argument that *City of Newport* was inapplicable because the FCA was intended to benefit all U.S. taxpayers, not merely those in a particular state or municipality. "A better reading of *Newport*," the Court explained, "is that we were concerned with imposing punitive damages on taxpayers *under any circumstances*." 529 U.S. at 785 n.15 (emphasis added).

As the Third Circuit has correctly recognized, "[t]he principles derived from *City of Newport*" are "directly applicable to" Section 504 of the Rehabilitation Act and Section 202 of the ADA. *Doe* v. *County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001). The Third Circuit explained:

> When Congress enacted Title II of the Rehabilitation Act, it knew of the common law rule precluding punitive damages against municipalities. Therefore, under the *City of Newport* framework, the question is whether Congress intended to disturb that settled common-law immunity.

Ibid.; see also *City of Newport*, 453 U.S. at 267 (finding "no evidence that Congress intended to disturb the settled common-law immunity").

C. The Eighth Circuit's Contrary Presumption Rests On A Fundamental Misreading Of *Franklin*

The court of appeals adopted exactly the opposite presumption in this case. Relying on this Court's decision in *Franklin*, the Eighth Circuit concluded that "once a cause of action is discovered, it *automatically* entitles a plaintiff to *all* appropriate remedies," including punitive damages – "and that finding then extends those remedies to *all other* interrelated statutes." Pet. App. 14a (emphases added). The court of appeals' reading of *Franklin* is simply mistaken.

1. The *Franklin* Presumption Does Not Apply To Punitive Damages

To begin with, it is difficult to see how *Franklin* could possibly "compel" recognition of a punitive damages remedy when no claim for punitive damages was asserted in that case. *Franklin* involved a claim for money damages by a former high school student who alleged that she had been sexually harassed by a teacher who had since left the school. The student was no longer receiving any form of education in the Gwinnett County system. In those circumstances, the "equitable remedies" suggested by the county were "clearly inadequate"; damages was the only remedy available to the plaintiff; and this Court repeatedly emphasized that a decision not to recognize a damages remedy under Title IX "would leave petitioner" with "no remedy at all." 503 U.S. at 76; see *ibid.* (denial of damages relief would leave victim of sexual harassment "remediless"). Thus, if the Court in *Franklin* had upheld the court of appeals' judgment and declined to recognize any remedy of monetary damages, it would have "render[ed] inutile causes of action authorized by Congress through

a decision that no remedy is available." 503 U.S. at 74; see also *Doe* v. *County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001) (explaining that the *Franklin* presumption "is rooted in the common law principle * * * that a right without a remedy is not a right at all").

Franklin was in line with other decisions in which this Court has considered the absence of any other meaningful remedies in deciding whether a damages remedy is "appropriate." In *Davis* v. *Passman*, 442 U.S. 228 (1979), an aide to a former Member of Congress alleged that she had been discharged because of her sex in violation of constitutional equal protection guarantees. The Court's cautious recognition of a damages remedy was based on both its perception of compensatory damages as *the* ordinary remedy for such violations and the absence of other remedies:

> First, a damages remedy is surely appropriate in this case. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* [v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388,] 395 [(1971)]. * * * Moreover, since respondent is no longer a Congressman, * * * equitable relief in the form of reinstatement would be unavailing. And there are available no other alternative forms of judicial relief. For Davis, as for Bivens, "it is damages or nothing." *Bivens*, *supra*, at 410 (Harlan, J., concurring in judgment).

442 U.S. at 246 (footnote omitted). In unanimously reaching the opposite conclusion – that damages were *not* appropriate in a case brought by a federal employee directly under the Constitution when other statutory remedies were available – the Court in *Bush* v. *Lucas* distinguished *Davis* v. *Passman* on this exact ground: "In reaching the conclusion [in *Passman*] that an award of damages would be an appropriate remedy, we emphasized the fact that no other alternative form of relief was available." 462 U.S. 367, 377 (1983). Most recently, in *Correctional Services Corp.* v. *Malesko*, 122 S. Ct. 515 (2001), the Court declined to extend the implied damages remedy recognized in *Bivens* to a case against a private corporation operating under contract with the Bureau of Prisons,

noting that the plaintiff was "not in search of a remedy as in *Bivens* and [*Passman*]." *Id.* at 523.

Here, as in *Bush* v. *Lucas* and *Malesko*, and completely unlike *Passman* and *Franklin*, respondent Gorman is by no means in search of *a* remedy. The jury awarded him more than $1 million in compensatory damages. Pet. App. 4a. He has been made whole by that award. The only question is whether a further exaction – a *punishment* of $1.2 million – should be imposed. See also *City of Newport*, 453 U.S. at 267 (describing punitive damages award against a municipal government as "a windfall to a fully compensated plaintiff"). That is not a question that *Franklin* addressed, much less answered. Nor would it render Gorman's right of action under Section 504 of the Rehabilitation Act or Section 202 of the ADA useless if this Court were to refuse to recognize a punitive damages remedy. "[I]rrespective of the availability of punitive damages against municipalities, several other monetary remedies are available to enforce the rights in [Section 202 of the ADA] and Section 504"; for that reason the "principle of *Franklin*" is simply inapplicable to this case. *County of Centre*, 242 F.3d at 456.

The Eighth Circuit's analysis also dislodges *Franklin* from its underlying rationale. As the court below acknowledged (Pet. App. 9a), the *Franklin* Court "affirmed the rule, articulated earlier in *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), that 'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.'" But the court of appeals ignored the historical lineage of the *Bell* v. *Hood* "rule." In *Bell*, this Court held that individuals who claimed to have been subjected to illegal arrests, searches and seizures of their property, and false imprisonment by FBI officers, could recover compensatory damages in a federal action for the violation of their constitutional rights. "[W]here federally protected rights have been invaded," this Court explained, "it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the *necessary* relief." 327 U.S. 678, 684 (1946)

(emphasis added). "And it is also well settled," the Court explained, "that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy to make good the wrong done*." *Ibid.* (emphasis added). As support for that last proposition, this Court cited *Dooley* v. *United States*, 182 U.S. 222 (1901), and the "cases cited and discussed" in *Dooley* "at pages 228-230."

All of the cited authorities – like *Bell* v. *Hood* itself – involved the question whether a particular remedy was needed to provide full *compensation* or *restitution* to an injured or aggrieved individual. Each of the cases, in other words, required the courts to decide what relief was truly "necessary" to make the plaintiff *whole*. See *Dooley*, 182 U.S. at 223 (involving recovery of duties paid under protest on goods imported into Puerto Rico); *id.* at 228-30 (discussing cases involving, among other things, recoupment or refund of unlawfully levied taxes or penalties, claims for compensation by property owners who had suffered takings of their property for public use, and recovery for the use of patented inventions). See also *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 49-51 (1979) (discussing this "compensation principle" in context of labor law in rejecting implied punitive damages remedy for breach of duty of fair representation). Consistent with these precursors, the opinion in *Franklin* "consistently speaks in a compensatory vein." *Moreno*, 99 F.3d at 789 n.3.

Properly understood, then, the *Franklin* presumption has no bearing on the question whether courts should recognize an implied judicial remedy of punitive damages. Rather, *Franklin* should be understood to apply only to cases in which there is a need to make whole a claimant for an injury – and to ensure that federal rights are not rendered "inutile" through the denial of all effective relief. This is not such a case. Indeed, punitive damages by their very nature do not present such a case. See *Foust*, 442 U.S. at 50 ("punitive damages * * * by definition[] provide monetary relief in excess of * * * actual loss") (internal quotations omitted).

That is presumably why, to our knowledge, this Court has *never* recognized punitive damages as an appropriate remedy in an implied cause of action.

2. The *Franklin* Presumption Does Not Apply To Claims Brought Under Section 504 Of The Rehabilitation Act Or Section 202 Of The ADA

As noted above (at 4), Congress in 1978 amended the Rehabilitation Act by adding a provision (Section 505) that described the "remedies" that would be available to a private party suing for a violation of Section 504. See 29 U.S.C. § 794a(a)(2). Similarly, when Congress passed the ADA in 1990, it included a provision specifying that the "remedies" for violations of Section 202 would be those applicable to Section 504 of the Rehabilitation Act. See 42 U.S.C. § 12133. By contrast, Title IX, which was at issue in *Franklin*, contained no provision governing available remedies.

And that makes all the difference in the world, as this Court held in *Lane* v. *Peña*, 518 U.S. 187 (1996). *Lane* involved the question whether Congress had waived the federal government's sovereign immunity for awards of monetary damages to private claimants suing under Section 504. In holding that no waiver had occurred, this Court reasoned:

> The existence of the § 505(a)(2) remedies provisions *brings this case outside the "general rule"* we discussed in *Franklin*: This is not a case in which "a right of action exists to enforce a federal right and Congress is silent on the question of remedies." 503 U.S., at 69. Title IX, the statute at issue in *Franklin*, made no mention of available remedies. The Rehabilitation Act, by sharp contrast, contains a provision labeled "Remedies and attorney fees," § 505. Congress has thus spoken to the question of remedies in § 505(a)(2), the only remedies provision directly addressed to § 504 violations * * * .

Id. at 197 (emphasis added).

As *Lane* thus makes clear, the *Franklin* "presumption" or general "rule" (aside from having nothing to do with punitive damages) does not apply to claims brought under Section 504 of the Rehabilitation Act. Because Congress included a similar "remedies" provision in the ADA, and provided that the same remedies that apply under the Rehabilitation Act would apply to ADA claims, *Franklin* is equally inapplicable to respondent's claim under Section 202 of the ADA. The Eighth Circuit's reliance on *Franklin* was flatly inconsistent with *Lane*.

In all events, the *Franklin* presumption is substantially more flexible than the Eighth Circuit supposed. As this Court explained in *Gebser*, when dealing with implied private rights of action, courts "have a *measure of latitude* to shape a *sensible remedial scheme* that *best comports with the statute*." 524 U.S. at 284 (emphases added). Indeed, by its terms the *Franklin* presumption extends only to "appropriate" relief (503 U.S. at 69) – and, contrary to the Eighth Circuit's view (Pet. App. 16a), a remedy may be "inappropriate" for a particular statutory scheme, or because it undercuts well-established principles of law, and not just because it does not fit the conduct that is at issue in a particular lawsuit. See, *e.g.*, *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-49 (1979) (rejecting an implied remedy of punitive damages under the Railway Labor Act because such an "extraordinary sanction" is not needed to satisfy the "compensation principle" that has traditionally informed the selection of appropriate remedies and, if permitted, "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area"); *City of Newport*, 453 U.S. at 267, 270-71 (apart from common-law immunity, the purposes underlying 42 U.S.C. § 1983 and considerations of public policy foreclose imposition of punitive damages without express legislative direction because such an award (1) "'punishes' only the taxpayers, who took no part in" the underlying conduct yet end up either "footing the bill" through "an increase in taxes" or suffering a corresponding "reduction in public services" when the municipal treasury is depleted to pay the award; (2) is "in effect

a windfall to a fully compensated plaintiff"; and (3) may present a "serious risk to the financial integrity" of a municipal government).

* * *

The short of the matter is this: Only the strongest, most compelling evidence of congressional intent could overcome the presumption that punitive damages are *not* available in an action against a municipal government under Section 504 of the Rehabilitation Act and Section 202 of the ADA. As we next show, all of the available evidence – far from overcoming that presumption – confirms that punitive damages are not available in this case.

II. Far From Overcoming The Presumption Against The Availability Of Punitive Damages, The Text, Structure, And History Of The Relevant Statutes Demonstrate That Congress Did Not Authorize The Recovery Of Punitive Damages In This Setting

A. The Statutory And Regulatory Framework

1. *The Remedial Provisions At Issue In This Case.* Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability" shall, "solely by reason of" the disability, be "excluded from the participation in," or "denied the benefits of," or "subjected to discrimination under," any public "program or activity" that receives federal financial assistance. 29 U.S.C. § 794(a). Section 202 of the ADA prohibits the same conduct, but applies more generally to any public program, activity, "or service" and applies to all public entities regardless of the receipt of federal funds. 42 U.S.C. § 12132. Respondent's suit is predicated on claims brought under these provisions.

For each of these anti-discrimination provisions, Congress has enacted a specific provision that delineates the remedies available for violations. In 1978, five years after it passed the Rehabilitation Act, Congress amended that statute by adding the following provision:

> The *remedies, procedures, and rights* set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [Section 504 of the Rehabilitation Act].

29 U.S.C. § 794a(a)(2) (emphasis added). In similar fashion, when Congress enacted the ADA in 1990 it included a separate provision (Section 203) that specified the remedies for violations of Section 202. That remedial provision states in full:

> The *remedies, procedures, and rights* set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title [Section 202 of the ADA].

42 U.S.C. § 12133 (emphasis added).

The pertinent remedial provisions of the Rehabilitation Act and the ADA thus are expressly linked to each other and, in turn, to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. See Pet. App. 12a. Because of that linkage, it is necessary to examine Title VI's remedial scheme – and the progression of these closely related civil rights statutes – to discern Congress's remedial intent.

2. *The "Remedies, Procedures, and Rights" Under Title VI of the Civil Rights Act of 1964.* Enacted in 1964, Title VI consisted of five separate sections. Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000d to 2000d-4). Section 601, which contains the anti-discrimination command, provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Also notable for present purposes are Sections 602 and 603, 42 U.S.C. §§ 2000d-1, 2000d-2. Section 602 directs every federal

"department or agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract" to "effectuate" Title VI's non-discrimination command "by issuing rules, regulations, or orders of general applicability" that are "consistent with achievement of the objectives of the statute authorizing the financial assistance." *Id.* § 2000d-1. It also provides:

> No such rule, regulation or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for a hearing, of a failure to comply with such requirement * * *, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Ibid.

In addition to the requirement that any agency "rule, regulation, or order" be "approved by the President," and the further requirement that voluntary compliance be sought initially, Section 602 includes a third safeguard for funding recipients. If the enforcement action involves the termination of, or the refusal to grant or continue, financial assistance, then "the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." 42 U.S.C. § 2000d-1. In addition, "[n]o such action shall become effective until thirty days have elapsed after the filing of such report." *Ibid.* Finally, Section 603 allows for judicial review of adverse administrative action taken under Section 602. 42 U.S.C. § 2000d-2.

In enacting Title VI, Title IX, and Section 504 of the Rehabilitation Act, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon* v. *University of Chicago*, 441 U.S. at 704-05) and Title VI (*Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)).

3. *The Section 504 Regulations.* Pursuant to Congress's mandate in the 1978 Act, the Justice Department currently has in place regulations implementing Section 504 of the Rehabilitation Act and Section 202 of the ADA, as described at pages 5-6, *supra*.

B. Allowing Punitive Damages Would Be Inconsistent With The Statutory And Regulatory Framework

Punitive damages "are not compensation for injury" but rather are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). This Court has described punitive damages as "quasi-criminal" (*Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)) and as "an extraordinary sanction" (*International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48 (1979)). Moreover, once threshold questions about the availability of punitive damages have been resolved, lay juries traditionally have been "accorded broad discretion both as to the imposition and amount of punitive damages" (*Foust*, 442 U.S. at 50), subject of course to judicial review under the Due Process Clause for "gross excessiveness" (*BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 568 (1996)). Consistent with that principle, the jury in this case was charged that "[w]hether to award plaintiff punitive damages and the amount of those damages are within your sound discretion." J.A. 72. Because of the jury's broad discretion with respect to punitive damages, "the impact of these windfall recoveries is unpredictable and potentially substantial." *Foust*, 442 U.S. at 50.

The availability of such quasi-criminal exactions, levied by lay juries possessed of substantial discretion, is manifestly inconsistent with the careful and detailed remedial scheme created by

Congress in Title VI (and incorporated by extension into the provisions at issue in this case). As the Sixth Circuit has correctly recognized, "Congress has chosen other ways to 'punish' those who violate § 504." *Moreno*, 99 F.3d at 791. See generally *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1516, 1521 (2001) (describing statutory enforcement mechanisms of Title VI); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-89 (1998) (same for Title IX). In particular, "a *punishment* of cutoff of federal funds" is prescribed by the statute for violations of properly promulgated administrative requirements. *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Me. 1985) (emphasis added) (citing this as a ground for disallowing punitive damages in case brought under Title VI); see also *Moreno*, 99 F.3d at 791-92; *DeLeo* v. *City of Stamford*, 919 F. Supp 70, 74 n.7 (D. Conn. 1995).

Indeed, one reason for this Court's recognition, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), of a private right of action under Title IX – which like Title VI includes a statutory provision allowing the sanction of funding termination – was to provide an alternative to the "severe" remedy of such termination, which this Court described as "a last resort." See *id.* at 704-05 & n.38; see also *Doe* v. *Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 482-83 (D.N.H. 1997) (surveying legislative history of Title IX and identifying evidence that "Congress was leery of giving private litigants the power to threaten grant recipients with large, punitive sanctions"). In *Cannon*, this Court reasoned that "*individual* relief" – *i.e.*, compensatory relief – "to a private litigant" available through a private right of action is a useful complement to the harsher cut-off remedy. 441 U.S. at 704-06 & n.38 (emphasis added).

The Eighth Circuit's conclusion, however, turns that logic on its head. Indeed, there is no reason why a punitive damages award could not vastly exceed the total amount of federal funding that a recipient has accepted, which would convert it into a much harsher penalty than the termination of funding. See *Gebser*, 524 U.S. at 290 (rejecting even compensatory damages based on

theories of *respondeat superior* and constructive notice because "an award of damages in a particular case might well exceed a recipient's level of federal funding"). And it is inconsistent with the reasoning of the Court in *Cannon* – which conceived of private rights of action as a *less* drastic alternative to the punitive remedy of a fund cut-off – to tolerate the *more* drastic remedy of punitive damages.

In addition, the "severe" funding termination remedy of "last resort" created by Congress is subject to a number of special safeguards. First, it cannot be wielded against a recipient "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Second, when the contemplated enforcement action involves the termination, or the refusal to grant or continue, financial assistance, then the statute provides a political check by requiring "the head of the Federal department or agency" to "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." *Ibid.* In addition, "[n]o such action" (*i.e.*, termination or suspension of funding) "shall become effective until thirty days have elapsed after the filing of such report." *Ibid.*

These carefully crafted limitations on the sanction of funding cut-off simply cannot be reconciled with the availability of punitive damages in a private civil action. "It would be unsound * * * for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." *Gebser*, 524 U.S. at 289 (emphasis in original). "Where a statute's express enforcement scheme hinges *its most severe sanction* on notice and unsuccessful efforts to obtain compliance," the Court reasoned, "we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of *greater*

liability without comparable conditions." *Id.* at 290 (emphasis added). So, too, here.

The elaborate procedural safeguards in the statutes are not merely designed to afford due process to grant recipients – they also afford the Executive Branch the opportunity to calibrate the method and extent of enforcement. This is quintessentially *the government's* function, drawing as it does upon administrative expertise and the perspective that comes from managing a nationwide funding program. A regime of punitive damages, however – which leaves the enforcement consequences in the hands of a disparate array of lay juries – is apt to undermine the enforcement prerogatives of the Executive Branch. It is one thing to permit private plaintiffs to make themselves whole. It is quite another to appoint each one as a private law enforcement officer.

The Court in *Gebser* looked as well to the underlying *regulations* in evaluating whether the private damages remedy sought by the plaintiff in that case was consistent with the "express remedial scheme." 524 U.S. at 288-290; see also *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. at 643-44 (same); *Malesko*, 122 S. Ct. at 523 (relying in part on Bureau of Prisons regulations in declining to extend implied damages remedy recognized in *Bivens*).[17] As explained above, those regulations included many of the same safeguards with respect to funding termination and other sanctions that are embodied in the text of Title VI. Imposition of a punitive damages remedy is thus inconsistent with the regulations as well.

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[17] The Eighth Circuit observed that "Congress' express provision in Title VI of administrative remedies" does not "preclude[]" the "availability of additional remedies." Pet. App. 10a n.6. While so much is apparent from the availability of a private right of action, the Eighth Circuit went further, reasoning that "administrative and private causes of action are *separate and distinct* such that a limitation on one does not operate against the other." *Ibid.* (emphasis added). Such deliberate refusal to examine the regulatory remedies, however, is flatly inconsistent with this Court's analysis in *Gebser* and *Davis* and hardly required by *Franklin*.

Indeed, it may be said that the Title VI regulations – which govern claims under both the Rehabilitation Act and the ADA – flatly forbid the imposition of punitive damages in circumstances like these. Those regulations provide that "[n]o action *to effect compliance* by any other means authorized by law shall be taken until" the Department of Justice has taken certain crucial steps. 28 C.F.R. § 42.108(d) (emphasis added). A private lawsuit seeking punitive damages would appear to constitute an "action to effect compliance"; after all, punitive damages are designed, in large part, "to deter * * * future" breaches of statutory obligations. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Yet, unless and until the Department of Justice takes the steps prescribed by the regulations, "no" such "action" for punitive damages should be cognizable. Not a single one of those steps has been taken in the present matter.[18]

Moreover, in urging that punitive damages be imposed, respondent's counsel emphasized that the Justice Department had made an inquiry into petitioners' compliance with the Department's regulations under the Rehabilitation Act and ADA after

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[18] Ironically, respondent actually *predicated* most of his claim for punitive damages *on the Section 504 regulations themselves* – including the portion of the regulations setting out such simple housekeeping obligations for grant recipients as the obligation to provide assurances of compliance with Section 504 and with the accompanying regulations (42 C.F.R. § 42.504(a)), to evaluate and modify their policies and practices (*id.* § 42.505(c)(1)), to allow interested persons to participate in the self-evaluation process (*ibid.*), to make certain records available for public inspection (*id.* § 42.505(c)(2)), to designate a responsible employee to coordinate compliance (*id.* § 42.505(d)), and to adopt a grievance procedure (*id.* § 42.505(e)). See J.A. 42-45, 64-67. In essence, respondent urged the jury to punish petitioners for violating the Justice Department regulations. Apart from the fact that the regulations prescribe their own means of "effecting compliance" with the Department's housekeeping requirements (28 C.F.R. § 42.108(d) (1992, 2001)), it is highly doubtful that the alleged breach of housekeeping regulations could *ever* warrant punitive damages.

receiving a complaint from respondent's sister about his arrest. J.A. 66-67. In response to that inquiry, the Board provided the Department with information and instituted corrective measures (including installation of wheelchair locks in police vans). Far from demonstrating that punitive damages were warranted, these undisputed facts show that the regulatory enforcement measures were fully applied. The notion that these mechanisms can or should be supplemented, without legislative authorization, by a punishment of more than $1 million levied by a lay jury in a private action is utterly lacking in merit.

C. When Congress Specified The Remedies For Section 504 Violations, It Adopted The Prevailing Judicial Interpretation Of Title VI As *Not* Authorizing Such Damages

As explained above, Congress added a provision to the Rehabilitation Act in 1978 providing that "[t]he *remedies, procedures, and rights* set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance" under Section 504. 29 U.S.C. § 794a(a)(2) (emphasis added). In 1990, Congress included a similar provision in the ADA with respect to Section 202 claims, which in turn refers back to, and adopts, the remedies available for Section 504 claims under 29 U.S.C. § 794a(a)(2). The language of these provisions invites an inquiry into the "remedies" that courts had recognized in private actions brought under Title VI. Such an inquiry yields still more evidence that punitive damages are not available in cases such as this.

As the Eighth Circuit recognized below, "[w]hen Congress enacted the Rehabilitation Act and at the time of the subsequent amendments [in 1986, 1987, and 1991], courts generally agreed that Title VI and section 504 did not afford monetary damages, and were in *near unanimity* that they *did not permit punitive dam-*

ages." Pet. App. 13a-14a (emphasis added) (footnote omitted).[19] In fact, the few cases cited by the Eighth Circuit as exceptions (see *id.* at 14a n.9) do not include a single case in which punitive damages were awarded or their availability specifically addressed (and upheld) under Title VI or Section 504. That should come as no surprise because, as the Sixth Circuit has observed, it was "[n]ot until 1994 – more than two decades after enactment of the Rehabilitation Act – [that] a single United States district court permit[ted] an award of punitive damages for a violation of § 504." *Moreno*, 99 F.3d at 784; see also *id.* at 789-90. And "[n]either were punitive damages thought to be available under Title VI of the Civil Rights Act of 1964" at the time of the 1986, 1987, and 1991 amendments. *Id.* at 790 (collecting cases).[20]

This lack of judicial recognition of a punitive damages remedy was effectively endorsed by Congress when it amended the

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[19] In 1986, in response to *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), Congress abrogated the States' Eleventh Amendment immunity with respect to suits based on violations of Section 504 of the Rehabilitation Act, Title VI, and Title IX. In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, which overturned *Grove City College* v. *Bell*, 465 U.S. 555 (1984), by defining "program or activity" in Title VI, Section 504 of the Rehabilitation Act, and related statutes to include "all of the operations" of an entity, "any part of which is extended Federal financial assistance." 42 U.S.C. § 2000d-4a.

[20] The majority of cases since *Franklin* have held that punitive damages are *not* available under Title VI. See. *e.g.*, *Bayon* v. *State Univ. of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001); *Sims* v. *Unified Gov't of Wyandotte County*, 120 F. Supp. 2d 938, 947 (D. Kan. 2000); see also *Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Me. 1985) (same) (pre-*Franklin*). Several of these decisions have involved municipal defendants and have relied on the holding of *City of Newport*. In *Davison* v. *Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1233 (C.D. Cal. 1998), the district court held punitive damages to be available under Title VI, but did so based on the same misreading of *Franklin* adopted by the Eighth Circuit below.

Rehabilitation Act in 1978. As Judge Meskill explained in 1980, "in the sixteen years since the passage of Title VI, those courts that have either assumed or held that a private action may be brought under the statute have uniformly granted only declaratory or injunctive relief." *Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 633 F.2d 232, 256 (2d Cir. 1980) (opinion of Meskill, J.), aff'd, 463 U.S. 582 (1983); see also *id.* at 256 (discussing reported cases and noting that in none was "compensatory relief * * * awarded under Title VI").[21] See also *Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 602 n.23 (1983) (opinion of Powell, J.) ("The lower courts are generally in agreement that it is not appropriate to award monetary damages for Title VI violations.") (citing cases). This lack of judicial recognition of *any* form of damages remedy under Title VI necessarily encompassed any claim for punitive damages. Moreover, the only reported decision before Congress's enactment of the Rehabilitation Act amendments in October 1978 in which a court was called upon to specifically address the availability of punitive damages under Title VI emphatically rejected that remedy as inappropriate. See *Rendon* v. *Utah State Dep't of Employment Sec. Job Serv.*, 454 F. Supp. 534, 536-37 & n.3 (D. Utah 1978).

D. The Text, Structure, And Legislative History Of The Civil Rights Act Of 1991 Strongly Confirm That Congress Did Not Intend To Authorize Punitive Damages

The Civil Rights Act of 1991, which added Section 1981a to Title 42 of the U.S. Code, warrants special mention because it contains additional evidence that Congress never intended to permit private plaintiffs to recover punitive damages against municipal defendants under Section 504 of the Rehabilitation Act

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[21] The other two members of the Second Circuit panel did not join this portion of Judge Meskill's opinion because they agreed on other grounds with his conclusion that the district court's grant of relief under Title VI must be reversed. See 633 F.2d at 254.

or Section 202 of the ADA. The 1991 Act created a limited and carefully defined right to seek punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applies to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. Significantly, it does *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see also *County of Centre*, 242 F.3d at 457.

As the Eighth Circuit recognized in this case, but inexplicably failed to credit, the "text and history of the 1991 Act" make clear that in enacting these provisions "Congress intended *to expand, and not to contract*, the available remedies" under the Rehabilitation Act and ADA. Pet. App. 15a (emphasis added); see also *ibid.* (making same observation about legislation proposed, but not enacted, in 1992). This Court has reached the same conclusion about the 1991 Act on several occasions. For example, in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 533 (1999), the Court observed that, "[w]ith the passage of the 1991 Act, Congress provided for *additional* remedies, including punitive damages, for certain classes of Title VII and ADA violations." *Id.* at 534 (emphasis added); see also *Pollard* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1951 (2001) (recognizing Congress's intent to provide "additional" remedies and observing that before 1991 Act punitive damages were not available "in cases of intentional * * * disability discrimination"); *Gebser*, 524 U.S. at 286 (noting that "[i]t was not until 1991 that Congress made damages available under Title VII").[22]

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[22] The legislative history of the 1991 Act confirms that Congress thought it was "*strengthen[ing] existing remedies*" by "provid[ing] more effective deterrence and ensur[ing] compensation commensurate with the harms suffered by victims of intentional discrimination." H.R. REP. No. 102-40(I), at 18 (1991) (emphasis added); see also *id.* at 64 (saying that money damages, including punitive damages, are intended to "[s]trengthen[] Title VII's remedial scheme"); H.R. REP. No. 102-40(II), at 28 (1991) ("there is a compelling need to amend Title VII to permit damages" – including punitive damages – "to be awarded in cases of intentional discrimination").

Moreover, as this Court explained in *Kolstad*, "[t]he very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination." 527 U.S. at 534. Applied to this case, that principle demonstrates that the mere juxtaposition, without more, of the limited punitive damages provisions of the 1991 Act (42 U.S.C. § 1981a) on the one hand, and the remedial provision governing Section 504 and Section 202 (29 U.S.C. § 794a; 42 U.S.C. § 12133) on the other, provides strong structural evidence of an intent on Congress's part *not* to authorize punitive damages under the latter provisions.[23] Indeed, the Court relied in part on a similar rationale in *Gebser* in rejecting liability for school districts under Title IX in the absence of actual notice. See 524 U.S. at 285-86. The Court there explained that Congress did not "contemplate[] unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs." *Id.* at 285. "It was not until 1991," the Court reasoned, "that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer." *Id.* at 286 (citing 42 U.S.C. § 1981a(b)(3)). Accordingly, the Court refused to accept petitioner's theory of liability because it "would amount * * * to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either

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[23] Several district courts have relied on that reasoning. See, *e.g.*, *Bayon* v. *State Univ. of New York at Buffalo*, 2001 WL 135817, at *4 (W.D.N.Y. Feb. 15, 2001) (1991 Act's creation of punitive damages remedy under Title I of ADA "counsels against any inference that punitive damages are available under Title II"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994) (same).

the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available." *Ibid.*

The same is true here. Congress has permitted limited recovery of punitive damages under Title VII and specific employment-related provisions of the ADA and the Rehabilitation Act. It has not extended that recovery to claims brought under Section 504 of the Rehabilitation Act or Section 202 of the ADA. Moreover, Congress in 1991 *expressly exempted* governmental entities from punitive liability under the limited provisions allowing that remedy. It is positively perverse to conclude from silence alone that Congress wished to impose on governmental entities under Section 504 and Section 202 the very punitive liability that it did not expressly impose on anyone under those sections, and from which it protected governmental entities under the sections for which it did expressly authorize punitive damages.

CONCLUSION

The judgment of the court of appeals should be reversed.

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FEBRUARY 2002

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), as amended, provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, * * *, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, as amended, provides in pertinent part:

> (a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
>
> (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, provides in full:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 203 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12133, provides in full:

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides in full:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 provides in full:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any

other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 603 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-2, provides in full:

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

be subjected to discrimination under any education program or activity receiving Federal financial assistance, * * * *

Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682, provides in full:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over

> the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

The Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides in pertinent part:

> (a) Right of recovery
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> * * * *
>
> (2) Disability
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> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
>
> * * * *
>
> (b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

The Department of Justice regulations implementing Title VI of the Civil Rights Act of 1964, 28 C.F.R. § 42.108 (1992, 2001), provide in relevant part:

(a) General. If there appears to be a failure or threatened failure to comply with this subpart and if the noncompliance or threatened noncompliance cannot be corrected by informal means, the responsible Department official may suspend or terminate, or refuse to grant or continue, Federal financial assistance, or use any other means authorized by law, to induce compliance with this subpart. Such other means include, but are not limited to: (1) Appropriate proceedings brought by the Department to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) Noncompliance with assurance requirement. If an applicant or recipient fails or refuses to furnish an assurance required under § 42.105, or fails or refuses to comply with the provisions of the assurance it has furnished, or otherwise fails or refuses to comply with any requirement imposed by or pursuant to Title VI or this subpart, Federal financial assistance may be suspended, terminated, or refused in accordance with the procedures of Title VI and this subpart. The Department shall not be required to provide assistance in such a case during the pendency of administrative proceedings under this subpart,

except that the Department will continue assistance during the pendency of such proceedings whenever such assistance is due and payable pursuant to a final commitment made or an application finally approved prior to the effective date of this subpart.

(c) Termination of or refusal to grant or to continue Federal financial assistance. No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until: (1) The responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this subpart, (3) the action has been approved by the Attorney General pursuant to § 42.110, and (4) the expiration of 30 days after the Attorney General has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until: (1) The responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved by the Attorney General, and (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance.

The Department of Justice regulations implementing Section 504 of the Rehabilitation Act, provide in pertinent part:

28 C.F.R. § 42.504 (1992, 2001):

(a) Assurances. Every application for Federal financial assistance covered by this subpart shall contain an assurance that the program will be conducted in compliance with the requirements of section 504 and this subpart. Each agency within the Department that provides Federal financial assistance shall specify the form of the foregoing assurance for each of its assistance programs and shall require applicants for Department financial assistance to obtain like assurances from subgrantees, contractors and subcontractors, transferees, successors in interest, and others connected with the program. Each Department agency shall specify the extent to which an applicant will be required to confirm that the assurances provided by secondary recipients are being honored. Each assurance shall include provisions giving notice that the United States has a right to seek judicial enforcement of section 504 and the assurance.

28 C.F.R. § 42.505 (1992, 2001):

(a) Remedial action. If the Department finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this subpart, the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination. This may include remedial action with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred, and with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) Voluntary action. A recipient may take steps, in addition

to the requirements of this subpart, to increase the participation of qualified handicapped persons in the recipient's program.

(c) Self-evaluation.
(1) A recipient shall, within one year of the effective date of this subpart, evaluate and modify its policies and practices that do not meet the requirements of this subpart. During this process the recipient shall seek the advice and assistance of interested persons, including handicapped persons or organizations representing handicapped persons. During this period and thereafter the recipient shall take any necessary remedial steps to eliminate the effects of discrimination that resulted from adherence to these policies and practices.
(2) A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Department on request: (I) A list of the interested persons consulted, (ii) a description of areas examined and problems identified, and (iii) a description of modifications made and remedial steps taken.

(d) Designation of responsible employee. A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall designate at least one person to coordinate compliance with this subpart.

(e) Adoption of grievance procedures. A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall adopt grievance procedures that incorporate due process standards (e.g. adequate notice, fair hearing) and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart. Such procedures need not be established with respect to complaints from applicants for employment. An employee

may file a complaint with the Department without having first used the recipient's grievance procedures.

The Department of Justice regulations implementing the Americans with Disabilities Act of 1990, 28 C.F.R. § 35.103 (1992, 2001), provide in relevant part:

> Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.

GRANTED

No. 01-682

Supreme Court, U.S.
FILED
MAR 29 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether punitive damages are among the full panoply of remedies Congress made available to plaintiffs suing for violations of Title II of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act of 1973.

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STATEMENT OF THE CASE

The sole issue properly presented in this case is whether punitive damages are ever available to plaintiffs under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. Whether the facts of this or any other case merit such an award is not before the Court. Nonetheless, while purporting to present a summary of the facts in the light most favorable to respondent and to the jury verdict in the district court, petitioners have loaded their factual statement with irrelevant descriptions of their own evidence, which the jury did not credit.

A. Facts

The facts established at trial and credited by the jury can be quickly summarized. Respondent Jeffrey Gorman is paraplegic as a result of a spinal cord injury and uses a wheelchair for mobility. Tr. 50-51. On the night of May 30, 1992, he visited a bar in Kansas City, Missouri, where he hoped to meet an acquaintance. Shortly after his arrival, a bouncer ejected him from the premises because the bar did not allow wheelchairs on the dance floor. Tr. 58-63.

Believing that he had been discriminated against, Mr. Gorman sought the assistance of nearby uniformed police officers. Tr. 64-65. The officers, who turned out to be moonlighting as private security, instead arrested Mr. Gorman for trespassing and summoned a Kansas City police van to take him to the station. Tr. 70, 65.

When the van arrived, Mr. Gorman saw that it had no wheelchair lift, no wheelchair restraints, and no alternative means of securely transporting a person with a spinal cord injury. Mr. Gorman told the police officers that he would not be able to support himself in the van's seats and could not safely be transported in the van. Instead of heeding Mr. Gorman's warnings, the officers lifted him from his wheelchair and placed him on a bench in the back of the van. Because he could not sit upright on the bench, the officers attempted to

use his belt to tie him to a wire mesh wall behind the bench. J.A. 5-10.

When the van started moving, Mr. Gorman could not hold himself upright. During the trip, his belt broke and he was thrown to the floor of the van, where he remained the rest of the way to the station. His full urine bag (which the police officers had not allowed him to empty before loading him onto the van) broke when he fell, soaking him. Tr. 79-83. He suffered severe injuries to his shoulder and back from the fall as well as an infection that resulted from urine being forced back into his body by pressure on the bag before it burst. Mr. Gorman's injuries required extensive medical treatment including shoulder surgery. Unfortunately, the back injuries Mr. Gorman suffered in the van cannot be surgically repaired because of his preexisting spinal injury. As a result, Mr. Gorman continues to suffer intense pain and spasms in his lower extremities—conditions that are likely to be permanent and that have prevented him from continuing to work full-time. J.A. 12-20.[1] The actual damages Mr. Gorman incurred from his treatment at the hands of the police included lost wages, medical bills, pain and suffering, and humiliation.

Mr. Gorman's injuries are not attributable to an isolated incident of police misconduct. The evidence established that the officers who arrested and transported Mr. Gorman had no training in the safe transportation of disabled persons, and that the Kansas City Police Department had no vans that were accessible to passengers in wheelchairs and no policies concerning the transportation of people with disabilities. J.A. 25-29, 42. Moreover, petitioners stipulated that although they had repeatedly filed written assurances with the federal government that their practices and policies complied with the Rehabilitation Act of 1973, those assurances were false. J.A.

[1] Petitioners' outlandish speculation that Mr. Gorman suffered these injuries while careening down a hill with a woman on his lap was contradicted by Mr. Gorman's evidence at trial and rejected by the jury.

69. Petitioners also stipulated that they did not begin to bring themselves into compliance with the Rehabilitation Act nor to train their officers about the requirements of the ADA and the Rehabilitation Act until after Mr. Gorman was injured. J.A. 69-70.

B. Procedural History

The procedural history of this case is convoluted, but its relevant features are straightforward. Mr. Gorman sued petitioners, Kansas City's Police Commissioners, in the United States District Court for the Western District of Missouri, seeking actual and punitive damages under Title II of the ADA and Section 504 of the Rehabilitation Act. After two appeals, the case was tried to a jury, which rendered a verdict for Mr. Gorman and awarded over $1 million in compensatory damages and $1.2 million in punitive damages.

Petitioners moved for judgment as a matter of law, arguing that punitive damages are never available against any defendant for violations of Title II or Section 504. Petitioners did not assert that their status as a governmental entity rendered them immune from punitive damages under the rationale of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The district court accepted petitioners' argument and set aside the jury's award of punitive damages.

The parties filed cross-appeals. Mr. Gorman's appeal argued that punitive damages are available under Title II of the ADA and Section 504, while petitioners' appeal rested primarily on their argument that they were an instrumentality of the State of Missouri and were entitled to Eleventh Amendment immunity from any action for damages (compensatory or punitive) under Title II or Section 504. In opposing Mr. Gorman's appeal, petitioners again did not argue that punitive damages were unavailable under *City of Newport.*

The Eighth Circuit reversed the district court's holding that punitive damages are unavailable under Title II and Section 504, but affirmed in all other respects. The court of ap-

peals rejected petitioners' argument that the Kansas City Board of Police Commissioners is an arm of the State entitled to Eleventh Amendment immunity from suit in federal court. With respect to the award of punitive damages, the court ruled that because both Title II and Section 504 create private rights of action without specifying the precise relief available, any appropriate relief is presumptively available under this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The court held that punitive damages fall within the scope of the relief available under Title II and Section 504 in appropriate circumstances. Accordingly, the Eighth Circuit remanded the case to the district court for "an independent review of the evidence to determine whether it supports punitive damages." Pet. App. 16a.

SUMMARY OF ARGUMENT

Title II of the Americans with Disabilities Act, enacted in 1990, broadly outlaws discrimination against people with disabilities in the provision of public services by public entities. Title II expands and extends rights previously granted only against recipients of federal funds under Section 504 of the Rehabilitation Act of 1973. Consistent with the broad purposes of Title II, Congress adopted a sweeping set of remedies. In contrast with other provisions of the ADA, which set forth express limits on remedies, Title II adopted the remedial provisions applicable to Section 504 of the Rehabilitation Act (as well as other federal civil rights statutes such as Title VI and Title IX)—remedies that had already been held by this Court to include private rights of action with no expressly stated limits on the relief available.

In adopting the unfettered remedial provisions of Title II, Congress unambiguously provided plaintiffs with a right of action for damages, and, indeed, with the full panoply of remedies generally available at law and in equity. Congress' stated intent to provide the full array of legal and equitable relief corresponds precisely with the generally applicable presumption that a federal court may award any appropriate

relief when Congress provides a private right of action and does not clearly limit the relief available. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Because punitive damages have long been recognized by this Court as an important tool in the arsenal of relief available in the federal courts under appropriate circumstances, their availability under Title II of the ADA, as well as under Section 504 of the Rehabilitation Act, is dictated both by Congress' affirmative desire to make available the full panoply of remedies and by the *Franklin* presumption that all such remedies should be provided unless Congress directs otherwise. Moreover, punitive damages serve the purposes of both Title II of the ADA and Section 504 by supplementing other enforcement mechanisms and adding the deterrence necessary to achieve Congress' goal of eliminating discrimination against people with disabilities.

Petitioners' status as a municipality does nothing to alter these conclusions. The argument that petitioners' governmental status bars punitive damages under *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), was never presented or decided below and is thus not before the Court. Even if it were, any presumption that punitive damages are not available against government entities would be overcome by clear evidence of congressional intent that governmental bodies be subject to the same rules of liability under the ADA and the Rehabilitation Act as private persons. Moreover, the policy considerations dispositive in *Newport* are absent here. In particular, the alternative deterrent mechanism of punitive damages against individual officials who violate the law is unavailable under the ADA and Rehabilitation Act, which have not been held to create rights of action against individuals. In addition, punitive damages awards will at times be necessary to prevent local governments and their taxpayers from reaping financial windfalls through noncompliance with the ADA.

ARGUMENT

I. TITLE II OF THE ADA CREATES A PRIVATE RIGHT OF ACTION WITH A FULL PANOPLY OF REMEDIES.

Underlying all the arguments of petitioners and the Solicitor General is the notion that the right of action at issue in this case is an "implied" one. But unlike other cases where the "implication" of a private right of action is a matter of debate and inference, here it is manifest that Congress explicitly created a private right of action in Title II of the ADA when it expressly incorporated remedial provisions under which the existence of a private right of action had already been established both by judicial decision and by direct legislation. Equally apparent is that the right of action Congress created carries with it a panoply of remedies specifically including damages. Because an understanding of these points is critical to the ultimate determination of the relief available under Title II, a detailed explanation of the remedial provisions of Title II and their relationship with other parts of the ADA—and other civil rights statutes—is necessary.

A. Congress Deliberately Created a Private Right of Action to Enforce Title II of the ADA.

The enactment of the Americans with Disabilities Act reflected Congress' determination to eradicate discrimination against people with disabilities and to mandate the steps needed to provide them with equal access to employment, government services, and public accommodations. To achieve these ends, Congress invoked all of its powers, "including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The resulting legislation, as this Court has recognized, is a "broad mandate," "sweeping" in its scope and "expansive" in its purposes—"a milestone on the path to a more decent, tolerant, progressive society." *PGA*

Tour, Inc. v. Martin, 532 U.S. 661, 675, 680 (2001) (quoting *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

The ADA's substantive provisions are divided into three titles addressing different aspects of the problem of unequal treatment of people with disabilities and providing remedies of very different scope. Title I of the Act generally forbids employment discrimination against people with disabilities by both governmental and private entities. ADA § 102, 42 U.S.C. § 12112. As originally enacted, Title I incorporated the "circumscribed remedies" (*Landgraf v. USI Film Products*, 511 U.S. 251, 285 n.38 (1994)) provided by Title VII of the Civil Rights Act of 1964—remedies that, as of 1990, did not include damages. ADA § 107(a), 42 U.S.C. § 12117(a) (incorporating remedies of 42 U.S.C. §§ 2000e-4, -5, -6, -8, and -9); *see, e.g., Landgraf*, 511 U.S. at 252 ("Before the enactment of the 1991 [Civil Rights] Act, Title VII afforded only 'equitable' remedies."); *United States v. Burke*, 504 U.S. 229, 238 (1992) (before passage of the Civil Rights Act of 1991, Title VII did "not allow awards of compensatory or punitive damages; instead, it limit[ed] available remedies to backpay, injunctions, and other equitable relief").

Similarly, Title III of the ADA, which forbids discrimination in the provision of "public accommodations" by private entities (*see* ADA § 302, 42 U.S.C. § 12182), incorporates the limited remedies set forth in 42 U.S.C. § 2000a-3(a) for violations of Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations. *See* ADA § 308(a)(1), 42 U.S.C. § 12188(a)(1). Section 2000a-3(a) in turn provides a private right of action only for "preventive" (*i.e.*, declaratory or injunctive) relief. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Like Title II of the Civil Rights Act, Title III of the ADA provides for enforcement actions brought by the Attorney General, in which civil penalties and monetary damages for victims of discrimination are available only if the Attor-

ney General requests them. ADA § 308(b)(2), 42 U.S.C. § 12188(b)(2). Title III does not authorize a private right of action for damages, and it expressly forbids punitive damages. ADA § 308(b)(4), 42 U.S.C. § 12188(b)(4).

The remedial provisions of Title II of the ADA, at issue here, are significantly different from those of Titles I and III. Title II broadly outlaws unequal treatment of people with disabilities by State and local governments, by forbidding both outright, intentional discrimination and exclusion from or denial of the benefits of government services, programs, or activities. ADA § 202, 42 U.S.C. § 12132. The substantive prohibitions of Title II are based on its predecessor, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), but its coverage of public entities is broader: Whereas Section 504 was based in part on the Spending Clause and was limited to federal agencies and programs and activities receiving federal financial assistance, Title II of the ADA, grounded on Congress' powers under the Commerce Clause and the Fourteenth Amendment, applies to all activities of State and local governments, regardless of the sources of their funding. Moreover, Title II's antidiscrimination mandate goes further than Section 504's. *See Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999) (Title II, unlike Section 504, prohibits discrimination that is not "solely" on account of disability).

Like Titles I and III, Title II has its own remedial provision. But unlike the other titles, its remedial scheme does not limit the private remedies available. Instead, Title II expressly incorporates the remedial scheme for violations of Section 504 of the Rehabilitation Act. Thus, Section 203 of the ADA (42 U.S.C. § 12133) states that the remedies available under Section 505 of the Rehabilitation Act (29 U.S.C. § 794a) for violations of Section 504 "shall be the remedies ... [the ADA] provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." ADA § 203, 42 U.S.C. § 12133. The relevant portion of Section 505, which was added to the Rehabilitation Act in

1978, provides in turn that "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by" any violation of Section 504. 29 U.S.C. § 794a(a)(2).[2]

The significance of these provisions, from the standpoint of the enacting Congress in 1990, is clear: Title II of the ADA authorizes a private right of action for violations of the requirements of Section 202 of the Act. Several factors support this conclusion. First, when the ADA was enacted, this Court had already recognized that Section 505(a)(2) of the Rehabilitation Act, whose remedies Section 203 of the ADA adopted, created a private right of action for retrospective relief to enforce Section 504 of the Rehabilitation Act. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984) ("This case requires us to clarify the scope of *the private right of action to enforce Section 504 of the Rehabilitation Act....*") (emphasis added).

Second, this Court had earlier recognized a private right of action to enforce Title IX. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Title IX's remedial provisions parallel those of Title VI. Indeed, this Court based its recognition of a private right of action under Title IX in large part on congressional awareness at the time Title IX was enacted of lower-court decisions holding that there was a private right of action under Title VI. *Id.* at 694-98. Likewise, the drafters of Title II of the ADA can only have intended to enact a private right of action when they incorporated the Rehabilitation Act's remedies, which in turn incorporated those of Title VI, which were identical to those that this Court had held created a private right of action in *Cannon*. *Cf. id.* at 696-97 ("It is

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[2] Also relevant is Section 505(b) of the Rehabilitation Act, which provides that a court may grant the prevailing party (other than the United States) a reasonable attorney's fee in "any action" brought under the Act. 29 U.S.C. § 794a(b). That provision demonstrates that the drafters of Section 505 contemplated that it authorized a right of action.

always appropriate to assume that our elected representatives, like other citizens, know the law ...").

Third, seven of the Justices in the fractured opinions in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), recognized a private right of action under Title VI itself, although the Justices were not in accord on the scope of that private right. *See id.* at 593-95 (opinion of White, J., joined by Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring); *id.* at 615 (Marshall, J., dissenting); *id.* at 635 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). Again, the ADA's adoption of Section 504's remedies, which in turn incorporated the Title VI remedies that were acknowledged in *Guardians* to support a private right of action, manifested a clear congressional intent to enact a private right of action.

Fourth, in 1986, Congress had enacted the Rehabilitation Act Amendments to abrogate the States' Eleventh Amendment immunity from damages in actions brought to enforce Section 504 (as well as in actions under Title VI, Title IX, and the Age Discrimination Act of 1975). 42 U.S.C. § 2000d-7(a). The legislation further provided that "[i]n a suit against a State for a violation of [Section 504], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in [a] suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). As this Court has recognized, the Rehabilitation Act Amendments can only be understood as reflecting congressional ratification of a private right of action under Section 504 and the other statutes referenced in 42 U.S.C. § 2000d-7(a). *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72-73 (1992); *id.* at 78 (Scalia, J., concurring in the judgment). This congressional endorsement of a Section 504 right of action plainly extends to Title II of the ADA, given Title II's explicit incorporation of Section 504's remedies.

Finally, the legislative history of Title II of the ADA dispels any doubt on the issue by stating expressly that Congress was aware of and intended to incorporate into Title II the private right of action to enforce Section 504:

> Section [203] incorporates the remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973. ... *The Rehabilitation Act provides a private right of action, with a full panoply of remedies available*, as well as attorney's fees.

H.R. Rep. No. 101-485(III), at 52 (1990) (emphasis added).

B. The Panoply of Title II Remedies Includes Damages.

In *Guardians*, a "clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation." *Franklin*, 503 U.S. at 70. Of course, as the Congress that enacted the ADA well knew, the damages remedy available under Title VI would necessarily be available under Section 504, and thus was also incorporated into Title II of the ADA when it adopted the remedies available for violations of Section 504.

In addition, the Rehabilitation Act Amendments of 1986 presupposed the existence not only of a private right of action to enforce Section 504, but also of a damages remedy—otherwise, abrogation of the States' Eleventh Amendment immunity would have been unnecessary, and the statute's reference to the availability of "remedies both at law and in equity" (42 U.S.C. § 2000d-7(a)(2)) would have made no sense. Thus, the 1986 legislation "must be read ... not only 'as a validation of *Cannon*'s holding,' ... but also as an implicit acknowledgment that damages are available." *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

Again, the legislative history of the ADA confirms that Congress adopted a damages remedy when it enacted Title II. The House Judiciary Committee Report's explicit statement that the private right of action under Section 504, which Title

II adopts, comes "with a full panoply of remedies available" is clear enough standing alone. H.R. Rep. No. 101-485(III), at 52. To drive home the point, the Committee Report cited *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982), which had expressly affirmed the availability of damages in a private right of action under Section 504. H.R. Rep. No. 101-485(III), at 52 n.62. In enacting Title II, therefore, Congress was aware of and adopted judicial decisions holding damages available under Section 504.[3]

Not every court that had ruled on the issue as of 1990 had agreed with *Miener* that damages were available for a violation of Section 504, but whether *Miener* in fact correctly interpreted the Rehabilitation Act is now beside the point. What matters is that Congress understood there to be a private right of action for damages for violations of Section 504 when it adopted Title II of the ADA. By expressly adopting the remedies it *understood* to be available under Section 504, Congress created damages remedy under Title II. *Cf. Cannon*, 441 U.S. at 711 ("[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.") (citation omitted).[4]

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[3] *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), another case approvingly cited in the House Judiciary Committee Report (H.R. Rep. No. 101-485(III), at 51), also held that Section 504 provided a "full panoply" of remedies, including damages. 567 F. Supp. at 382-83. *Nelson*'s "full panoply" language was cited by another district court in holding punitive damages available under Section 504. *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1138 (D. Iowa 1984).

[4] For this reason, the arguments made by petitioners and the Solicitor General about the state of the law in 1978, when Congress enacted Section 505 of the Rehabilitation Act, have little relevance. The determinative issue now is not what remedies the Congress that enacted Section 505 thought were available under Title VI, but what remedies the Congress that enacted the remedial provisions of Title II of the ADA in 1990 provided. *Cannon* illustrates the point. There, the Court held that the argument that Title VI was not originally intended to provide a private right

(*Footnote continued*)

This Court's decision in *Franklin* confirms that the Congress that enacted the ADA was correct in understanding that Section 504 included a private damages remedy. *Franklin* holds that, in cases involving intentional violations, damages are an available remedy in the implied right of action under Title IX. 503 U.S. at 76. *Franklin*'s reasoning, which relies heavily on the majority's recognition of a Title VI damages remedy in *Guardians*, on the Rehabilitation Act Amendments of 1986, and on "the traditional presumption in favor of any appropriate relief" (*id.* at 73) when Congress creates a right of action, is as applicable to Section 504 (and to Title II of the ADA) as it is to Title IX. *Franklin* thus underscores that when Congress enacted Title II of the ADA, it *correctly* believed that a damages remedy was available under Section 504, and it expressly incorporated that remedy into Title II.

II. THE PANOPLY OF TITLE II AND SECTION 504 REMEDIES INCLUDES PUNITIVE DAMAGES.

Given that Congress created a private right of action for damages in Title II of the ADA, the issue here is whether that right of action, and its preexisting counterpart under the Rehabilitation Act, is to be truncated to exclude altogether the

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of action when it was enacted in 1964 was largely irrelevant to the question whether Congress intended to create a private right of action when it incorporated Title VI's provisions into Title IX in 1972: "Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI could be enforced by a private action and that Title IX would be similarly enforceable." *Cannon*, 441 U.S. at 710-11. Thus, the fact that as of 1978, some lower courts had (erroneously) held that *no* damages, compensatory or punitive, were available under Title VI (*see Rendon v. Utah State Dept. of Employment Sec. Job Serv.*, 454 F. Supp. 534, 536-37 & n.3 (D. Utah 1978)), is of no significance in resolving the scope of the remedies Congress intended to adopt when it enacted the ADA in 1990, following twelve years of legal developments that had convinced Congress that damages were available under both Title VI and Section 504.

possibility of awarding punitive damages, regardless of the circumstances of a particular case. Principles firmly established by the decisions of this Court foreclose circumscribing the right of action under Title II of the ADA or the Rehabilitation Act in such a manner.

A. Any Appropriate Relief—Including Punitive Damages—Is Presumptively Available.

As the Eighth Circuit correctly perceived, this Court's most authoritative pronouncement on the issue is *Franklin v. Gwinnett County Public Schools*. There, the issue was whether the private right of action under Title IX, which the Court had previously recognized in *Cannon*, encompassed a damages remedy in cases involving intentional violations. *Franklin*'s holding that damages were available was based on the principle "that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief," 503 U.S. at 69—a principle that, the Court stated, "has deep roots in our jurisprudence." *Id.* at 66.

Accordingly, the Court held, "although we examine the text and history of a statute to determine whether Congress intended to create a right of action, ... we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* Elsewhere in the opinion, the Court stated the rule as follows: "[A]ll appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies," *id.* at 68; "[T]he 'existence of a statutory right implies the existence of all necessary and appropriate remedies,'" *id.* at 69 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)); "[T]he traditional presumption [is] in favor of a federal court's power to award appropriate relief in a cognizable cause of action," *id.* at 70; "The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," *id.* at 70-71; "[T]he traditional presumption [is] in favor of any appropriate relief for violation of a federal right," *id.* at 73. The Court emphasized the importance of "our historic judicial authority to award appropriate relief in cases brought in our court system," and declined to engage in "selective abdication" of this authority by ruling out particular remedies absent clear congressional directives foreclosing their use. *Id.* at 74.

Franklin rested on a long line of decisions of this Court holding that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see Franklin*, 503 U.S. at 66-68 (citing case law underlying *Bell v. Hood*). The opinion in *Franklin* pointed out that this Court had consistently adhered to this principle in cases such as *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), *Carey v. Piphus*, 435 U.S. 247 (1978), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982). More pertinent here, the Court observed that the acceptance of a damages remedy under Title VI by the majority of the Justices in *Guardians*, as well as the Court's recognition of a retrospective monetary remedy for Section 504 violations in *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 631, reflected applications of the presumption in favor of all appropriate remedies in cases where a right of action exists.

The *Franklin* presumption is fully applicable to punitive damages. This Court has repeatedly recognized that punitive damages are a part of the ordinary remedial arsenal of the courts and have long been "a firmly established feature of American law." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in the judgment). In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that the Seventh Amendment afforded a right to trial by jury in actions seeking damages under Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3613), and observed that "the relief

sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." 415 U.S. at 196.

The Court has also acknowledged that punitive damages are among the judicial remedies typically available for aggravated wrongs in cases such as *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 274, 278 & n.24 (1989), and *Haslip*, 499 U.S. at 15-17. As the Court stated in *Molzof v. United States*, 502 U.S. 301, 306 (1992):

> Although the precise nature and use of punitive damages may have evolved over time, and the size and frequency of such awards may have increased, this Court's decisions make clear that the concept of "punitive damages" has a long pedigree in the law. "It is a well-established principle of the common law, that in actions for trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." *Day v. Woodworth*, 13 How. 363, 371 (1852).

Or, as the Court put it more succinctly in *United States v. Burke*: "[P]unitive or exemplary damages are generally available in those instances where the defendant's conduct was intentional or reckless." 504 U.S. at 237.

Consistent with its recognition that punitive damages are among the range of remedies ordinarily available (where circumstances warrant) in American courts, this Court has held that punitive damages are potentially available in actions to vindicate rights guaranteed by federal law even in the absence of express statutory authorization, except where Congress has foreclosed them. Thus, the Court has held that punitive damages are available in actions under 42 U.S.C. § 1983, *see Smith v. Wade*, 461 U.S. 30 (1983); *Carey v. Piphus*, 435 U.S. at 257 n.11, in actions under 42 U.S.C. § 1981, *see Johnson v. Railway Express Agency*, 421 U.S. 454

(1975),[5] and, perhaps most significantly, in *implied* rights of action under the Constitution (*i.e.*, *Bivens* actions), *see Carlson v. Green*, 446 U.S. 14, 22 (1980).

In *Carlson v. Green*, the Court stated its reasons for allowing punitive damages in *Bivens* actions in a nutshell: "Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' ... and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." 446 U.S. at 22 (quoting *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971)). The reasons the *Carlson* Court gave for the availability of punitive damages in a right of action implied from the Constitution are equally (if not more) applicable to a right of action Congress has deliberately created by statute: As one of the "remedial mechanism[s] normally available in the federal courts" (*id.*), punitive damages are, under the reasoning of *Franklin*, presumptively available (where appropriate) in an otherwise cognizable cause of action to vindicate statutory rights.

B. No Clear Congressional Directive Bars Punitive Damages under Title II or Section 504.

Under *Franklin*, the issue whether punitive damages are available for violations of Title II of the ADA (and Section 504 of the Rehabilitation Act) depends on whether "there is a clear direction to the contrary by Congress." *Franklin*, 503 U.S. at 70-71. Absent such a clear direction, the *Franklin* presumption in favor of any appropriate relief controls.

As both the majority and the concurrence in *Franklin* observed, only rarely will a statute provide a clear direction one way or the other about the remedies available under an im-

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[5] *See also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001) ("42 U.S.C. § 1981 permit[s] the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination....").

plied right of action. As the majority put it, "it is hardly surprising" when Congress "[says] nothing about the applicable remedies for an implied right of action." *Id.* at 71; *see also id.* at 76 (Scalia, J., concurring in the judgment).

Title II of the ADA, however, is not a statute in which the existence of a private right of action is a matter of inference in the face of congressional silence or ambiguous legislative history. Rather, Title II represents an instance where Congress expressly adopted a right of action. In so doing, Congress did not provide a "clear direction" that punitive damages or any other particular remedies be foreclosed. Rather, Congress' action affirmatively manifests an intent that there be no restrictions on the nature of the relief available to plaintiffs under Title II.

As explained above, at the time Congress enacted Title II and adopted the remedies available under Section 505(a) of the Rehabilitation Act, case law and prior congressional action (especially the adoption of the Rehabilitation Act Amendments of 1986) pointed unequivocally to the existence of an implied right of action for monetary damages under Section 505(a) for violations of Section 504 of the Rehabilitation Act. Under such circumstances, where there is no doubt that Congress created a private right of action, there is nothing "question begging" (*Franklin*, 503 U.S. at 77 (Scalia, J., concurring in the judgment) about inferring an intent to allow any appropriate relief when Congress has not imposed any limits on the available remedies. Rather, as even the concurring Justices in *Franklin* agreed, "[w]e can plausibly assume acquiescence in our *Bell v. Hood* presumption when the Legislature says nothing about remedy in expressly creating a private right of action; perhaps even when it says nothing about remedy in creating a private right of action by clear textual implication ...." *Id.* Here, Congress' express adoption of a right of action that had definitively been held to exist places the ADA's Title II in the category of statutes that expressly create a private right of action but do not define the

scope of the remedy. Congress' decision not to limit the relief available under such a statute strongly supports the availability of any relief, including, in appropriate cases, punitive damages.

Moreover, Title II's legislative history shows that Congress' failure to limit the relief available under Title II was not inadvertent, but reflected a deliberate choice to provide plaintiffs using the private right of action borrowed from the Rehabilitation Act with "a full panoply of remedies." H.R. Rep. No. 101-485(III), at 52. Given that punitive damages are undoubtedly part of the "full panoply of tools traditionally used by courts to do justice between parties," *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring in the result), the legislative history shows that Congress intended that they be among the remedies potentially available in appropriate cases under Title II.[6] Thus, far from overcoming the *Franklin* presumption in favor of any appropriate relief, the direct evidence of Congress' intent jibes perfectly with it.

The overall structure of the ADA also reveals that if Congress had intended to foreclose punitive damages under Title II, it would have done so expressly. A comparison of Title II's remedial provisions to those in Title III of the Act is particularly instructive. As noted above (at pp. 7-8), Title III, which outlaws disability discrimination in private-sector "public accommodations," creates a limited damages remedy enforceable only in actions brought by the Attorney General. Title III permits the recovery of "such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General." ADA § 308(b)(2)(B), 42 U.S.C. § 12188(b)(2)(B).

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[6] *See also Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 648 n.11 (1999) (statute intended to provide "full panoply of remedies" for patent violations would have subjected States to punitive damages but for Eleventh Amendment).

However, the statute also expressly provides that "[f]or purposes of subsection (b)(2)(B) of this section, the term 'monetary damages' and 'such other relief' does not include punitive damages." *Id.* § 308(b)(4), 42 U.S.C. § 12188(b)(4).

The statute's express exclusion of punitive damages illustrates not only that Congress knew how to—and did—exclude punitive damages when it wanted to do so, but also, and more importantly, that Congress was aware that if it provided a right of action for "monetary damages" and did *not* exclude punitive damages, the likely (and logical) inference would be that it intended to permit them. Put another way, the provision implies that a "damages" remedy *includes* punitive damages unless the term is defined to exclude them—a result that, again, is precisely in line with the general presumption in favor of any appropriate relief established in such cases as *Bell v. Hood* and *Franklin*. Given that the legislative history of Title II makes clear that Congress was specifically aware that it was providing a right of action for *damages* when it adopted the remedies of the Rehabilitation Act (*see supra* pp. 6-13), Congress' failure to exclude *punitive* damages in Title II, as it did in Title III, reflects its intent not to foreclose them in appropriate cases under Title II.

Petitioners, backed by the Solicitor General, seek to find support for their contrary view of congressional intent by pointing to the amendment of the remedial provisions of Title I of the ADA in the Civil Rights Act of 1991. In that legislation, Congress for the first time provided for compensatory and punitive damages, subject to a cap of $300,000, in employment discrimination actions against nongovernmental employers under Title VII of the Civil Rights Act of 1964, Section 501 of the Rehabilitation Act, and Title I of the ADA. *See* 42 U.S.C. § 1981a(a) & (b). Petitioners and the Solicitor General observe that this legislation was intended to "expand" the remedies available under the ADA and the Rehabilitation Act, and they argue that if uncapped punitive damages were already available under Title II of the ADA

and/or Section 505(a) of the Rehabilitation Act, the provisions of the 1991 Act would not have "expanded" the available remedies, but would actually have limited them.

This argument reflects a fundamental misunderstanding of the differences between the remedial scheme for employment discrimination under Title I of the ADA and the remedies for discriminatory denials of access to public services under Title II of the Act. As originally enacted in 1990, Title I adopted the expressly limited employment discrimination remedies of Title VII of the Civil Rights Act, under which a successful plaintiff could obtain only equitable remedies such as reinstatement, other injunctive relief, backpay, and "frontpay." *See* ADA § 107(a), 42 U.S.C. § 12117(a) (incorporating Title VII remedies); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-48 (2001). Title VII specifically did "not allow awards for compensatory or punitive damages." *United States v. Burke*, 504 U.S. at 238; *see also Pollard*, 532 U.S. at 847-48, 851; *Landgraf v. USI Film Products*, 511 U.S. at 285 n.38.

The expressly limited Title VII remedial scheme adopted in Title I of the ADA thus contrasted sharply with the "common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies." *United States v. Burke*, 504 U.S. at 241. As *Franklin* confirmed, Title II of the ADA, like the statutes whose remedial scheme it adopted (Section 504, Title VI, and Title IX) fall into the category of federal antidiscrimination statutes offering broad remedies similar to those available under the common-law tradition. Indeed, *Franklin* roundly rejected the government's suggestion that remedial limits similar to those of Title VII should be read into these statutes. There, the Court stated (503 U.S. at 75):

> Finally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what

remedies are available for violation of a federal right, this position conflicts with sound logic.

Grasping the fundamental differences between, on the one hand, the Title VII remedial model as originally adopted by Title I of the ADA in 1990 and, on the other hand, the Title VI-Title IX-Section 504 model incorporated in Title II of the ADA is essential to understanding why the "expansion" of the *employment discrimination* remedies in the 1991 Civil Rights Act is irrelevant to the scope of the remedies available under Title II. As this Court has explained, the 1991 Act "expanded the remedies available to [employment discrimination] plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages." *Pollard*, 532 U.S. at 848.[7] Before the 1991 Act, the statutes expressly ruled out awards of compensatory and punitive damages for most employment discrimination plaintiffs; after the passage of the Act, such damages (subject to the statutory caps) were available to employment discrimination plaintiffs under Title VII, Title I of the ADA, and Section 501 of the Rehabilitation Act. That was plainly an "expansion" of the available remedies for employment discrimination, *regardless* of whether punitive damages were already potentially available for violations of Title II of the ADA. That Congress chose in 1991 to expand the "circumscribed remedies" (*Landgraf*, 511 U.S. at 285 n.38) that were previously available for employment

[7] *See also Pollard*, 532 U.S. at 851 ("In 1991, ... Congress further expanded the remedies available in cases of intentional employment discrimination to include compensatory and punitive damages."); *Landgraf*, 511 U.S. at 253-55 ("[The 1991 Act] significantly expands the monetary relief potentially available to plaintiffs who would [only] have been entitled to backpay under prior law. ... In short, ... the 1991 Act effects a major expansion in the relief available to victims of employment discrimination."); *United States v. Burke*, 504 U.S. at 241 n.12 ("Congress' decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable under Title VII ....").

discrimination under the ADA does not support an inference that the remedies under Title II were ever similarly circumscribed, nor does it suggest any intention to limit the remedies already available under Title II.

Indeed, the framers of the 1991 Act were careful *not* to limit punitive damages remedies that already existed under the civil rights laws. Under 42 U.S.C. § 1981, punitive damages were already available to civil rights plaintiffs who could prove that prospective employers had refused to enter into contracts with them on account of race. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 171-75, 181-82 (1989) (reaffirming *Runyon v. McCrary*, 427 U.S. 160 (1976)); *Johnson v. Railway Express Agency*, 421 U.S. at 460 (holding punitive damages available for employment discrimination under § 1981). The 1991 Act, even while capping the punitive damages potentially available under Title VII, expressly provided that "[n]othing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title." 42 U.S.C. § 1981a(b)(4). Thus, as this Court explained in *Pollard*:

> [Before 1991,] 42 U.S.C. § 1981 permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination. Thus, [the 1991 Act] brought all forms of intentional employment discrimination into alignment, at least with respect to the forms of relief available to successful plaintiffs. However, compensatory and punitive damages awarded under § 1981a may not exceed the statutory limitations set forth in § 1981a(b)(3), while such damages awarded under § 1981 are not limited by statute.

532 U.S. at 851. More broadly, *Pollard* emphasized that the new damages remedies created by 42 U.S.C. § 1981a were all "*in addition*" to remedies already available (*id.* at 852), and

were not intended to limit relief that could be awarded before 1991. *Id.* at 854.

In the final analysis, then, the real significance of the 1991 Act to this case is twofold: First, the Act was not intended to eliminate or limit the scope of remedies that were already available under the ADA or other civil rights legislation. The 1991 Act therefore cannot be construed as affecting the availability of punitive damages under Title II of the ADA. Second, like the exclusion of punitive damages under Title III of the ADA, 42 U.S.C. § 1981a demonstrates that when Congress intended to deny or limit punitive damages when creating a damages remedy under the ADA and related statutes, it did so expressly. Because Congress did not impose any such limitation on the damages relief available under Title II, this Court should not take it upon itself to do so.

C. The Punitive Damages Remedy Serves the Policies of Title II and Section 504.

A punitive damages remedy in appropriate cases is fully consistent with the policies underlying both Title II of the ADA and Section 504 of the Rehabilitation Act. The ADA reflects an ambitious and far-reaching policy "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and, to achieve that purpose, "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) & (2); *see also Martin*, 532 U.S. at 674-75.

Critical to the goal of eliminating discrimination against people with disabilities is the provision of remedies to achieve that end. The Committee Reports on the Act observed that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions," and that "attempts to weaken the remedies available under the ADA would make the ADA an 'empty promise of equality.'" H.R. Rep. No. 101-485(II), at 40 (1990); *see also* S. Rep. No. 101-116, at 15 (1989). The House Report noted the "poor enforcement of existing federal disability rights legislation" (*i.e.*, Section 504), H.R. Rep. No. 101-485(II), at 40, and the Senate Report characterized existing federal laws as "inadequate." S. Rep. No. 101-116, at 18. In the words of one witness cited in the House Report, "There has not been enough compliance with the 504 regulations. ... It is not enough to just have it down on the books." H.R. Rep. No. 101-485(II), at 40. Illinois Attorney General Neil Hartigan, in testimony cited in the Senate Report, summed up the rationale for strong remedies: "The whole trick is to make it more expensive to break the law than it is to keep the law." S. Rep. No. 101-116, at 15.

Punitive damages advance the ADA's policy of eliminating discrimination against people with disabilities by doing just that: making it more expensive to violate the Act than to comply with it. As this Court has recently observed, punitive damages are by nature extremely well adapted to this end. "[P]unitive damages ... serve an obvious public function in deterring future violations," and they "may often have a greater impact on ... behavior ... than the threat of an injunction." *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 764-65 (2002).

Petitioners and the Solicitor General largely ignore the congruence between the policies and purposes of the ADA and the availability of punitive damages for violations of Title II of the Act. Instead, they focus on the Rehabilitation Act and contend that an award of punitive damages for a violation of Section 504 is inconsistent with the scheme of federal enforcement under the Act—in particular, with the availability of a federal funding cutoff as a penalty for aggravated violations of Section 504.[8] A punitive damages remedy, they

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[8] Petitioners and the Solicitor General note that there are federal enforcement regulations under the ADA as well as the Rehabilitation Act, but they do not point to any particular enforcement mechanism under the

(*Footnote continued*)

contend, would displace this carefully wrought enforcement system and impose penalties more severe than the funding cutoff that, they argue, is in effect the "statutory maximum."

Concerns about the possible disproportionality between punitive damages and the funding cutoff remedy, however, have no application to Title II of the ADA. Because Title II is not limited to federally funded activities, its remedies need hardly be measured against the irrelevant enforcement mechanism of a cutoff of federal funds. Moreover, any concern that punitive damages might frustrate the purposes of the Rehabilitation Act by leading potential funding recipients to forgo federal financial assistance that might benefit people with disabilities clearly does not extend to punitive damages awards under Title II. An entity subject to Title II could derive no benefit from declining to accept federal funds, because doing so would not insulate it from Title II's proscriptions or remedies. Allowing the broad remedial and deterrent goals of the ADA to be limited by concerns that apply only to the narrower scope of the Rehabilitation Act would be a classic case of the tail wagging the dog.

Moreover, even as applied to Section 504, petitioners' theory is nothing more than an attempt to resurrect an argument that the Court disposed of over 20 years ago in *Cannon*. There, the defendant argued that permitting a private right of action under Title IX would be inconsistent with federal enforcement of Title IX through the withdrawal of funding from noncompliant programs. This Court rejected the argument for a number of reasons. The Court emphasized that the purpose of the statute was not only to prevent federal funding of discrimination, but also, more broadly, to protect citizens

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ADA regulations that is inconsistent with a punitive damages remedy. Petitioners contend that a punitive damages remedy will allow them to be punished for violations of what they call "housekeeping" regulations, but they do not explain how the knowing violation of critical substantive regulations at issue here was merely a matter of "housekeeping."

from discrimination—a goal that private enforcement would advance. 441 U.S. at 704. In addition, the Court recognized that federal enforcers have limited resources and that permitting private remedies allows pursuit of violations that federal agencies may not even be able to investigate. *Id.* at 707 n.41. Perhaps most significantly, the Court pointed out that a funding cutoff is a severe, "last resort" remedy that enforcers will be loath to use except in the most extreme cases. *Id.* at 704-05 & nn. 38-39. Given the limited efficacy of this remedy, the Court concluded that private remedies, far from interfering with federal enforcement, would advance the statutory purpose of combating discrimination. *Id.* at 704-08.[9]

Seven of the nine Justices of this Court who participated in the *Guardians* decision four years after *Cannon* reached the same conclusion. Justice White's lead opinion, joined by Justice Rehnquist, concluded that the existence of a private right of action (including monetary remedies for intentional violations) was not inconsistent with the statutory funding cutoff sanction under Title VI. *See Guardians*, 463 U.S. at 593-94, 597. Justice Marshall's opinion succinctly stated the reasons private remedies can, and indeed must, coexist with the defunding mechanism:

> Private retrospective relief also constitutes a 'necessary supplement' to the administrative enforcement mechanism contained in Title VI. ... The statutory sanction of a fund cutoff cannot sufficiently ensure general compliance with the command of Title VI, because the sheer quantity of federal financial assistance programs makes Government enforcement alone impractical and because a fund cutoff is too Draconian to be widely used. Retrospective liability for Title VI violations comple-

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[9] Despite their focus on the importance of the funding cutoff remedy, neither petitioners nor the Solicitor General contest *Cannon*'s point that the remedy is so rarely used as to be largely ineffective.

ments administrative enforcement by providing a more realistic deterrent against unlawful behavior.

Id. at 626-27 (Marshall, J., dissenting). Similarly, Part I of Justice Stevens' opinion, which Justices Brennan and Blackmun joined, and with which Justice O'Connor agreed (*see id.* at 612 (O'Connor, J., concurring in the judgment)), concluded that the funding cutoff mechanism did not preclude private remedies under Title VI, including retrospective relief. *Id.* at 638-39.

Petitioners contend, however, that punitive damages are different from other damages because awards of punitive damages may exceed the amount of federal financial assistance a funding recipient receives, rendering the relief even more draconian than a funding cutoff. The argument, however, proves both too much and too little. Too much, because in some cases, even a compensatory damages award could exceed the amount of financial assistance a defendant receives, *see Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), yet compensatory damages are available under Spending Clause measures despite the existence of the federal funding cutoff enforcement mechanism. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 640-41 (1999); *Franklin*, 503 U.S. at 74-75. Too little, because in the great majority of cases a damages award, whether compensatory or punitive, will likely not approach the amount of money a funding recipient receives from the federal government over time. *See Guardians*, 463 U.S. at 601 ("an award of damages would not be as drastic a remedy as a cutoff of funds") (opinion of White, J.); *id.* at 638-39 n.7 ("[T]he record in this case gives no basis for thinking that the cost of an appropriate award of damages to the petitioners would exceed the total amount of respondents' federal subsidy. And, as a general proposition, it is usually assumed that a cutoff of federal funds would be significantly more drastic than an individualized remedy for the victim of a Title VI violation.") (Stevens, J., dissenting).

The enormous and unlawful financial windfall gained in this case by Kansas City over its many years of noncompliance with Title II and Section 504, coupled with the likelihood that in most cases damages awards will be far smaller than the federal financial assistance received by the defendants, renders irrelevant petitioners' repeated complaint that defendants in general, and local governments in particular, will not be able to withstand purportedly unchecked jury awards of punitive damages. That concern is hardly substantiated here given the approximately one-to-one ratio of compensatory to punitive damages, the gravity of the misconduct Mr. Gorman endured, and the evidence of petitioners' long history of knowing disregard of federal law. In any event, the district court has not yet determined whether the award of punitive damages in this case was "appropriate" under *Franklin*, including whether petitioners' conduct reflected "reckless or callous indifference to the federally protected rights of others," Pet. App. 16a (quoting *Smith v. Wade*, 461 U.S. at 56), and whether the amount awarded satisfied constitutional standards of proportionality.[10]

III. PETITIONERS' EFFORTS TO TAKE THIS CASE OUTSIDE THE *FRANKLIN* FRAMEWORK ARE UNAVAILING.

A. The *Franklin* Presumption Does Not Exclude Punitive Damages.

Petitioners and the Solicitor General argue that punitive damages do not fall within *Franklin*'s presumption in favor of the availability of "any appropriate relief." Rather, they

[10] This Court therefore need not consider whether, in a proper case, an award of punitive damages might be limited by consideration of the amount of federal financial assistance received by a defendant and/or the financial gain reaped by the defendant through noncompliance with federal law. *Cf. TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 461-62 (1993) (opinion of Stevens, J.) (considering wrongdoer's potential gain in assessing propriety of punitive damages award).

assert, *Franklin* rested on case law concerning the availability of "remedial" relief for the redress of injuries—a category that, they say, includes compensatory damages but not punitive damages, whose function is not to make the victim whole but to penalize and deter misconduct.

The argument that punitive damages are not "remedies" within the meaning of *Franklin*, however, flies in the face of a host of decisions of this Court. In *Carlson v. Green*, for example, this Court expressly referred to punitive damages as a "remedial mechanism," 446 U.S. at 22, and as an element of a "remedial scheme." *Id.* at 22 n.10. The Court used the same terms to refer to punitive damages in *Silkwood*, which held that preemption of state-law "remedies," specifically including punitive damages, would not be presumed absent clear evidence of congressional intent. 464 U.S. at 255.

Moreover, in *Smith v. Wade*, the Court rejected precisely the argument now advanced by petitioners and the United States. There, the Court held that punitive damages are available under Section 1983 even though Section 1983 does not expressly authorize punitive damages, but provides only that defendants may be held "liable to the party injured in an action at law, suit in equity, or other proper proceeding for *redress*." 42 U.S.C. § 1983 (emphasis added). The Court flatly rejected the proposition that the use of the term foreclosed availability of punitive damages. 461 U.S. at 36 n.5.

Likewise, the Solicitor General errs in contending that this Court's decision in *Carey v. Piphus*, 435 U.S. 247, erected a general "compensation principle" that disfavors punitive damages in actions based on violations of federal rights. *Carey v. Piphus* rejected an award of damages that purported to provide compensation for purely abstract injuries; but the opinion expressly acknowledged that the principle that compensatory damages must be measured and limited by actual injuries is not incompatible with the award of punitive damages for violations of federal statutory and constitutional rights "in a proper case." 435 U.S. at 257 n.11. In-

deed, *Smith v. Wade* relied in part on *Carey v. Piphus* in holding punitive damages available in Section 1983 actions. 461 U.S. at 36 n.5.

Even more remarkable is the Solicitor General's argument that the reasoning of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), limits relief in implied rights of action to compensatory damages because only such damages are necessary to provide a remedy to plaintiffs for whom, in Justice Harlan's famous words, "it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring). If the Solicitor General's reading of *Bivens* were correct, punitive damages would be unavailable in *Bivens* actions—but as *Carlson v. Green* teaches, *Bivens* permits punitive damages. 446 U.S. at 22. Thus, the Solicitor General's *Bivens* example disproves his point.

Petitioners' related point that *Franklin* does not support an award of punitive damages because barring such damages would not leave Mr. Gorman without a remedy is similarly meritless. *Franklin* itself made clear that the availability of one remedy does not depend on all other remedies being futile. Thus, the *Franklin* Court rejected the argument that damages were permissible under Title IX only where equitable relief was inadequate. *See* 503 U.S. at 75-76.

Equally unpersuasive is the Solicitor General's argument that *International Brotherhood of Eiectrical Workers v. Foust*, 442 U.S. 42, erected a presumption against the availability of punitive damages in implied statutory rights of action. The majority opinion in *Foust* neither mentions such a presumption nor purports to announce any general principles concerning the circumstances under which punitive damages should be available in implied statutory rights of action. Instead, the *Foust* majority's rejection of punitive damages awards against labor unions in implied rights of action for breach of the duty of fair representation rested on the Court's analysis of factors particular to the field of labor relations—considerations that, in the majority's view, compellingly

demonstrated that Congress did not intend to provide such a remedy. Thus, the Court emphasized that "the threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations," 442 U.S. at 51-52, and rejected their availability "[b]ecause general labor policy disfavors punishment." *Id.* at 52. Only in this specific factual context did the majority state that it would not permit punitive damages without "clear congressional guidance." *Id.*

Unlike the majority opinion in *Foust*, the concurring opinion, written by Justice Blackmun and joined by Chief Justice Burger and Justices Rehnquist and Stevens, did discuss the general principles governing the availability of remedies in general—and punitive damages in particular—in implied rights of action. Justice Blackmun's opinion anticipated the majority's approach in *Franklin* by asserting that, in a cause of action properly before it, a federal court "has at its disposal the full panoply of tools traditionally used by courts to do justice between parties." 442 U.S. at 53 (Blackmun, J., concurring in the result). "Punitive damages," Justice Blackmun continued, "being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise." *Id.* Four years later, in *Silkwood*, the Court expressly adopted this aspect of Justice Blackmun's *Foust* concurrence in holding that the burden is on a party opposing punitive damages "to show that Congress intended to preclude such awards." 464 U.S. at 255 (citing *Foust*, 442 U.S. at 53 (Blackmun, J., concurring in the result)).[11]

[11] Adoption of the Solicitor General's new presumption *against* punitive damages where Congress creates a right of action but does not specify the relief available would have far-reaching consequences beyond this case. The lower courts have broadly agreed that the *Franklin* presumption applies to punitive damages not only under civil rights legislation such as Title VI, Title IX, Title II of the ADA, and Section 504, but under a range of other statutes as well. *See, e.g., Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and

(*Footnote continued*)

The Solicitor General further contends that decisions refusing to recognize the *existence* of rights of action, such as *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515 (2001), support a narrow construction of the relief available where Congress provides a right of action, assertedly because "separation of powers" concerns cast doubt on the legitimacy of judicial recognition of forms of relief not expressly provided for by statute. The Solicitor General's argument is at odds with *Franklin*, which rejected precisely the same argument.

In *Franklin*, as here, the Solicitor General argued that the Court's refusal to recognize implied rights of action for violations of some statutory rights reflected abandonment of the presumption in favor of any appropriate relief where a right of action is available. The Court stated unequivocally that the government's position reflected a fundamental "misunderstanding over the difference between a cause of action and the relief afforded under it." *Franklin*, 503 U.S. at 69. The Court further explained that "[u]nlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no ... increase in judicial power," *id.* at 73-74, and hence poses no threat to separation of powers principles. Indeed, the Court stated, separation of powers principles would be undermined more by judicial abdication of the power to award traditionally available remedies than by exercise of that authority. *Id.* at 74.

Health Act); *Lebow v. American Trans Air*, 86 F.3d 661 (7th Cir. 1986) (Railway Labor Act); *Beckett v. Atlas Air, Inc.*, 968 F. Supp. 814 (E.D.N.Y. 1997) (Railway Labor Act); *Oldroyd v. Elmira Sav. Bank*, 956 F. Supp. 393 (W.D.N.Y. 1997) (FIRREA), *vacated in part on other grounds*, 134 F.3d 72 (2d Cir. 1998); *Burns-Vidlak v. Chandler*, 980 F. Supp 1144 (D. Haw. 1997) (ADA Title II and Section 504; citing cases), *app. dism'd*, 165 F.3d 1257 (9th Cir. 1999); *Canty v. Old Rochester Regional School Dist.*, 54 F. Supp. 2d 66 (D. Mass. 1999) (Title IX).

B. The *Franklin* Presumption Applies to Section 505 of the Rehabilitation Act.

Notwithstanding that *Franklin*'s presumption in favor of any appropriate relief is generally applicable to punitive damages, petitioners (but not the Solicitor General) argue that the presumption is specifically inapplicable to the right of action created by Section 505(a) of the Rehabilitation Act, and, by extension, to Title II of the ADA. Petitioners contend that this Court so held in *Lane v. Peña*, 518 U.S. 187 (1996), but their argument tears language from that opinion out of its context and distorts the holding of the Court.

The issue in *Lane* was whether, in creating a right of action for monetary damages for violations of Section 504 of the Rehabilitation Act, Section 505(a)(2) constituted a sufficiently unambiguous waiver of the sovereign immunity of the United States to permit actions for damages against federal agencies alleged to have violated Section 504 directly in the conduct of their activities. The Court held that such actions were barred by sovereign immunity because Section 505(a)(2) expressly provided for remedies only against federal agencies acting in their capacities as "provider[s] of [Federal financial] assistance" and did not explicitly create a right of action against federal agencies that directly conducted programs or activities. *See* 518 U.S. at 192-93. *Lane*'s holding that Section 505(a)(2) did not provide a *cause of action* against a federal agency acting as a direct provider of government services has no bearing on the issue here, as it is undisputed that both the ADA and the Rehabilitation Act provide a cause of action against petitioners.

To be sure, in arriving at its holding, *Lane* rejected the argument that the *Franklin* presumption supported a damages claim *against the federal government* under Section 505(a)(2), for two reasons. First, the requirement that waivers of the sovereign immunity of the United States be express precluded resort to *Franklin*'s presumption about the availability of remedies not expressly provided. 518 U.S. at 196.

Second, the Court noted that Section 505(a)(2) *expressly* addresses the issue of what entities it authorizes remedies against, yet *omits* federal agencies except when acting as funding providers. *Id.* at 196. By expressly addressing that particular issue, the Court held, Section 505(a)(2) rendered the *Franklin* principle inapplicable to the specific question presented in *Lane*: whether damages were available against federal agencies not acting as funding providers. *Id.*

In holding that Section 505(a)(2)'s specificity about *who* was amenable to suit took "*this case* outside the 'general rule' we discussed in *Franklin*," *id.* (emphasis added), the Court did not, as petitioners suggest, hold that the *Franklin* presumption was altogether inapplicable to remedies under Section 505(a)(2). Such a holding would have made no sense, for although Section 505(a)(2) specifically addresses *who* is subject to the remedies it authorizes, it does not specifically delineate the *scope* of the relief available against those entities. Instead, it incorporates the remedies that are *impliedly* available under Title VI, to which the *Franklin* presumption applies. *See Franklin*, 503 U.S. at 70.[12] Thus, the *Franklin* presumption also necessarily controls the scope of the relief available under Section 505(a), and, therefore, under Title II of the ADA.

C. Spending Clause Concerns Do Not Limit the Relief Available under Title II or Section 504.

Petitioners and the Solicitor General further contend that, regardless of whether the conventional *Franklin* presumption in favor of any appropriate relief would otherwise permit the award of punitive damages for violations of Title II and Section 504, the Spending Clause concerns articulated in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, and

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[12] The one exception to this lack of specificity is that Section 505 expressly provides for attorney's fees in addition to whatever other remedies are available. *See* 29 U.S.C. § 794a(b).

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), limit the relief available even for intentional violations of the Rehabilitation Act and preclude imposition of punitive damages under it. Although they acknowledge that the ADA is not a Spending Clause enactment, they further contend that because Title II adopts the remedies of Section 505(a) of the Rehabilitation Act, it is also subject to Spending Clause-based limits on remedies. Neither part of the petitioners' argument withstands scrutiny.

Gebser provides no support for the view that the Spending Clause limits the relief available for intentional civil rights violations to remedies expressly defined by statute, and, indeed, other decisions of the Court expressly reject that theory. In *Gebser*, this Court, following such prior decisions as *Pennhurst* and *Guardians*, held that a defendant subject to the constraints imposed by Title IX only because of its receipt of federal funds may not be held liable for damages solely because of *conduct* that it did not know (and indeed, could not have known) would place it in violation of Title IX's prohibitions. *See* 524 U.S. at 287-90. As this Court explained the following year in *Davis v. Monroe County Board of Education*, 526 U.S. at 640, the essential teaching of *Gebser*, as well as *Pennhurst* and *Guardians*, on which *Gebser* is based, is that under Spending Clause legislation, "private damages actions are available only where recipients of federal funding had adequate notice that they could be held liable *for the conduct at issue*" (emphasis added). *Davis* went on to hold that where the defendant did have such notice (as where it intentionally engaged in the unlawful conduct at issue or was aware of and deliberately indifferent to it), the defendant may be subjected to the full range of appropriate relief available under *Franklin*. *Id.* at 642-43.[13]

[13] *Davis* and *Franklin*, which recognized tort-like damages remedies for violations of Spending Clause measures, also refute petitioners' argu-

(*Footnote continued*)

The *Gebser* limit on the *type of conduct* for which defendants may be held liable under Spending Clause legislation thus offers no support for the argument that the Spending Clause also limits the *form of relief* available for conduct, such as that in this case, that meets the standard for liability. Indeed, this Court expressly held in *Franklin* that the Spending Clause principles articulated in *Pennhurst* (of which *Gebser* is only the most recent application) did *not* limit the relief available for intentional violations of Spending Clause-based civil rights legislation. As *Franklin* stated:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. See *id.*, at 17. This problem does not arise in a case such as this, in which intentional discrimination is alleged.

503 U.S. at 74-75 (emphasis in original). The Spending Clause concerns animating *Gebser* and *Pennhurst* thus provide no support for curtailing the remedies available in cases involving intentional civil rights violations such as those in this case.[14] *Gebser*'s reservation of some judicial discretion concerning the scope of implied remedies permits courts to define the *circumstances* under which particular remedies are

ment that only "contract" remedies are available for violations of Spending Clause statutes.

[14] Neither petitioners nor the Solicitor General suggest that the *Gebser* standard of liability (assuming its applicability to Title II, a non-Spending Clause measure) was not satisfied in this case. Indeed, that issue is not even before this Court.

available, but not to exclude categorically particular forms of relief.

Petitioners' attempt to transform *Gebser* from a requirement of clear notice of the type of conduct that will give rise to liability into a requirement that Congress clearly specify the types of relief to which a funding recipient will be subject for intentional violations would have vast consequences. Taken seriously, it would require the Court to overturn the entire body of case law, beginning with *Cannon*, running through *Guardians* and *Darrone*, and culminating in *Franklin* and *Davis*, that recognizes rights of action for injunctive and monetary relief under Title VI, Title IX, and Section 504. Since, in all those cases, the remedies were implied rather than expressly provided for in the statute, in none of the cases could it be said that the funding recipient was clearly on notice that its conduct would subject it to the particular relief at issue. Indeed, petitioners acknowledge that their position on the Spending Clause is inconsistent with this Court's recognition of private rights of action under Spending Clause legislation. Pet. Br. 18. Nonetheless, they argue that the Court should draw the line at punitive damages—but they advance no principled distinction from the standpoint of the Spending Clause between that relief and the remedies the Court has already permitted. Their inability to provide a coherent justification for their proposed transformation of the *Gebser* principle dooms their argument.

Even if petitioners' Spending Clause analysis were persuasive with respect to the availability of punitive damages for violations of Section 504 of the Rehabilitation Act, it would remain irrelevant to whether punitive damages are available under Title II of the ADA. Whatever limits the Spending Clause may place on relief under statutes passed on its authority, there is no basis for importing those constitutional limits into the ADA, a statutory scheme based on sources of authority to which limits on the spending power are irrelevant. Title II is indisputably not Spending Clause

legislation: Its provisions apply regardless of whether a public entity or program receives federal funding, and the enacting Congress expressly "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce." 42 U.S.C. § 12101(b)(4). As the Court recognized in *Gebser*, Spending Clause constraints have no application to such legislation, which "applies ... without regard to federal funding" and "is framed in terms not of a condition [on funding] but of an outright prohibition." 524 U.S. at 286. Where, as here, Congress has invoked its full authority and has acted broadly to outlaw discrimination and provide its victims with a full panoply of remedies, *Gebser*'s Spending Clause concerns have no bearing on the scope of relief available. To hold otherwise would allow Congress' invocation of multiple powers in different statutes to drag the level of remedies down to those supported by the least potent power invoked in the narrowest statute.

Although they recognize that Title II of the ADA has nothing to do with the Spending Clause, petitioners contend that because Title II adopts the Rehabilitation Act's remedial scheme, relief under Title II must also be subject to Spending Clause limits. Petitioners bury this crucial link in the chain of their argument in a footnote that cites no authority. *See* Pet. Br. 21 n.13. Even if the Spending Clause does limit the forms of relief under Section 505(a)(2) of the Rehabilitation Act, petitioners' argument is unpersuasive. Petitioners do not suggest that the remedial limit that they purport to derive from *Gebser* is grounded in the *text* of Section 505(a)(2). Rather, they contend that the limit is imposed on the statute by the Constitution. Even if a Spending Clause limitation were superimposed on the remedies otherwise available under the terms of Section 505(a)(2), however, that would not mean that Congress intended to adopt that limitation when it incorporated the terms of Section 505(a)(2) into legislation based on constitutional powers that are not even arguably subject to a similar limitation. *See Garcia v. S.U.N.Y. Health Sciences*

Center of Brooklyn, 280 F.3d 98, 113, 115 (2d Cir. 2001) (different constitutional constraints may be applicable to remedies under Title II and the Rehabilitation Act because of the different constitutional powers pursuant to which they were enacted).[15]

In fact, there are compelling reasons to believe that Congress could not have imported Spending Clause-based limits on relief (assuming for the sake of argument that they exist) into Title II of the ADA. First, such limits are inconsistent both with the "sweeping" and "expansive" purpose of the ADA (*Martin*, 532 U.S. at 675, 680) and with Congress' explicit intent to provide the full panoply of remedies to Title II plaintiffs. Second, Congress could not possibly have intended to incorporate all the limits on the Rehabilitation Act's Section 505(a)(2) remedies into Title II of the ADA. Section 505(a)(2), by its express terms, provides remedies only against funding recipients and federal funding agencies—a scope generally commensurate with the limits on Section 504's substantive reach and with the extent of congressional Spending Clause power. In adopting Section 505(a)(2)'s remedies to enforce the broader proscriptions of Title II of the ADA, which are in no way limited to programs that receive federal funds, Congress obviously did not intend to limit remedies under Title II to funding recipients or funding agencies. That limitation would have made no sense, and

[15] Although the Solicitor General agrees with petitioners that the Spending Clause limits the relief available for violations of Section 504 and that the same limits apply to Title II, the United States has previously taken the position that Spending Clause remedial limits do *not* apply to Title II. *See Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997). The majority in *Tyler* did not address this argument because it was raised only by the United States as amicus curiae, and not by a party to the case. *Id.* The third member of the panel, Judge Jenkins, dissented from the majority's decision not to reach the issue and explained at length why Spending Clause limits were inapplicable to the remedy provided in Title II of the ADA. 118 F.3d at 1404-16 (Jenkins, J., dissenting).

would have rendered Title II, for practical purposes, entirely redundant of Section 504. Congress must have contemplated, when it adopted Section 505(a)(2)'s remedies in Section 203 of the ADA, that the Title II remedy would go further than would be permissible under a Spending Clause enactment.

IV. THE *NEWPORT v. FACT CONCERTS* DOCTRINE DOES NOT BAR PUNITIVE DAMAGES HERE.

A. The *Newport* Issue Was Neither Raised Nor Decided Below, and This Court Should Not Address It in the First Instance.

Petitioners and the Solicitor General argue, somewhat halfheartedly, that whatever the general rule on the availability of punitive damages under Title II of the ADA and Section 504 of the Rehabilitation Act may be, punitive damages should not be available against petitioners under the principles of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), because, as members of a Board of Police Commissioners sued in their official capacity, petitioners are a "municipality." Pet. Br. 23-25; U.S. Br. 31-32. Although one might have assumed from the phrasing of petitioners' question presented ("[w]hether punitive damages may be awarded against a municipal government ...") that the *Newport* point would be their principal argument, their failure to emphasize the issue now is readily explained by their failure to present it in any manner to the courts below. As an issue neither argued nor decided in either the district court or the court of appeals, it is not properly before this Court.

In the district court and the court of appeals, petitioners' principal argument was that punitive damages were not available against *any* defendant under Title II and Section 504. Their briefs in the court of appeals did not so much as cite *Newport*. In the lower courts, petitioners did not even acknowledge that they *were* a municipality. On the contrary, they contended that they were an instrumentality of the State of Missouri, and they argued not for exemption from punitive

damages under *Newport*, but for Eleventh Amendment immunity from *any* action for damages (an argument the Eighth Circuit rejected on the strength of this Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997)).[16] Not until their petition for certiorari did petitioners argue that, as a municipality, they could not be subjected to punitive damages under the *Newport* rationale—an entirely different argument from the Eleventh Amendment argument advanced below.

It is a long-established principle that this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002). The Court applied this rule in circumstances very similar to those presented here in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). That case presented the statutory question whether Title II of the ADA applied to the programs offered by state prison systems. In this Court, the petitioner sought to argue for the first time a related but different issue: Whether the application of Title II to State governments was a proper exercise of Congress' constitutional powers. Although that issue had a direct bearing on whether the petitioner was even amenable to suit under the Eleventh Amendment, the Court declined to reach it (*id.* at 212-13):

[16] Even had petitioners established that they were part of the State, their claim of immunity would have had to contend with the statutory abrogation of sovereign immunity in both the ADA and the Rehabilitation Act. 42 U.S.C. § 12202; 42 U.S.C. § 2000d-7. Their strategic decision to argue for State status and Eleventh Amendment immunity, however, was driven by the fact that the Eighth Circuit had already held that the ADA's abrogation of sovereign immunity is not valid for claims under Title II of the Act (an issue this Court declined to reach last Term in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001)). *See Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999). In light of the tenuousness of their claim to "Statehood" and this Court's very recent decision in *Garrett* dismissing the writ of certiorari as improvidently granted to the extent it raised the Eleventh Amendment issue under Title II, petitioners apparently decided the never-before-raised *Newport* issue had a better chance of interesting this Court.

> We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress's power under either the Commerce Clause ... or § 5 of the Fourteenth Amendment.... Petitioners raise this question in their brief, ... but it was addressed by neither the District Court nor the Court of Appeals, where petitioners raised only the *Gregory* plain-statement issue. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970) (citations omitted). See also *Dothard v. Rawlinson*, 433 U.S. 321, 323, n. 1 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927). We decline to do so here.

The same result should obtain here. Petitioners' failure to present the issue below has deprived this Court of the benefit of the lower courts' views on the question. Moreover, because the Eighth Circuit did not even implicitly decide the *Newport* issue, leaving its ruling intact will not establish or perpetuate a precedent one way or the other on the question.[17] Given petitioners' default and the lower courts' silence, there is no need for this Court to decide the issue.[18]

[17] At least one district court in the Eighth Circuit has already held that the Eighth Circuit's decision in this case leaves open the question whether punitive damages may be imposed on a municipality. That court then went on to decide the issue adversely to the punitive damages claimant. *Schultzen v. Woodbury Central Community School District*, 2002 WL 262057 (D. Iowa Feb. 22, 2002).

[18] Ironically, in *Newport* itself, the Court had to consider whether the issue of municipal immunity from punitive damages had been waived by the city's failure to object to a jury instruction. This Court reached the issue, *but only because it had been presented to and decided by both the district court (in a motion for new trial) and the court of appeals.* 453 U.S. at 255-56; *accord, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (reaching city's claim that municipal liability had not been

(*Footnote continued*)

B. The *Newport* Presumption Against Subjecting Governmental Entities to Punitive Damages Does Not Apply to Title II or Section 504.

In *Newport*, this Court held that municipal governments are "immune from punitive damages under 42 U.S.C. § 1983." 453 U.S. at 271. The "immunity" recognized by *Newport*, however, is unlike Eleventh Amendment immunity in that it is not constitutionally based and may be overcome by congressional enactment. As this Court recently explained, the doctrine is no more than a "presumption against imposition of punitive damages on governmental entities" (including both municipalities and States). *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000). As such, the presumption is trumped by clearly expressed congressional intent. *Id.* at 787.

Here, a clear expression of congressional purpose exists not only in the form of Congress' stated intent in Title II to provide a "full panoply of remedies" against public entities (*see supra* pp. 11-13), but also, even more pointedly, in provisions applicable to both the ADA and the Rehabilitation Act that make clear Congress' intent *not* to provide governmental entities with a general immunity against the forms of remedies available against private actors.

The Rehabilitation Act Amendments of 1986 did more than simply attempt to abrogate State sovereign immunity against private actions brought to enforce Section 504 of the Rehabilitation Act. They went on to provide specifically that the full range of relief available against private defendants (as well as against public entities other than States) could be obtained in an action against a State:

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established despite arguable failure to make proper objection to jury instruction, where issue had been presented to and decided by both district court and court of appeals). Petitioners did not preserve the *Newport* issue here in a comparable manner—or in any manner.

> In a suit against a State for a violation of a statute referred to in paragraph (1) [including Section 504 of the Rehabilitation Act], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2). When Congress enacted the ADA in 1990, it included almost identical language in Section 502 of the Act (42 U.S.C. § 12202):

> In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

These provisions demonstrate Congress' intent to override any doctrines—such as the *Newport* rule—that might otherwise suggest that remedies available against a private defendant under the ADA or Section 504 of the Rehabilitation Act should be denied simply because a defendant is a government entity. And because (as demonstrated above) punitive damages are generally available for violations of Section 504 and Title II, both the Rehabilitation Act Amendments and the ADA unmistakably reflect congressional intent that punitive remedies also be available against governmental entities, thus directly overcoming the *Newport* presumption.[19]

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[19] The unsettled issue of the validity of the abrogation of Eleventh Amendment immunity for violations of Section 504 and Title II has no bearing on the significance of the relevant statutory provisions for present purposes. The only issue under *Newport* and *Vermont Agency* is whether Congress has manifested an intent to overcome the presumption that punitive damages are unavailable against governmental entities. Regardless of whether they suffice to overcome Eleventh Amendment immunity, 42 U.S.C. §§ 2000d-7 and 12202 are clear expressions of congressional in-

(*Footnote continued*)

Although 42 U.S.C. §§ 2000d-7(a)(2) and 12202 expressly provide only that *State* governmental entities are subject to the same remedies as private entities or other public entities (*see Lane v. Peña*, 518 U.S. at 199), the statutes dispel any presumption against the availability of punitive damages against municipalities as well, for two reasons. First, since *Vermont Agency* holds that the *Newport* presumption applies to both State and local governmental entities, by clearly subjecting State government entities to the full range of remedies, the statutes effectively overcome the *Newport* presumption that governmental entities in general have a special protection from punitive damages. Second, it would make no sense for Congress to subject States but not municipalities to punitive damages, because the legislative history of the ADA demonstrates that municipal governments have been the worst offenders in depriving people with disabilities of equal access to government services. *See Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001); *see also Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (cataloging history of discrimination by State and local governments compiled as part of ADA's legislative history).

Again, the contrast between the Title II remedy and the terms of the Civil Rights Act of 1991 helps to confirm that the presumption under the ADA is that governmental entities have no special exemption from available remedies unless Congress so specifies. In permitting, for the first time, awards of punitive damages for employment discrimination under Section 501 of the Rehabilitation Act and Title I of the ADA, the 1991 Act expressly exempted governmental entities. 42 U.S.C. § 1981a(b)(1). Congress' action reflects its understanding that, under 42 U.S.C. §§ 2000d-7(a)(2) & 12202,

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tent with respect to the availability of remedies against governmental entities. *See Garrett*, 531 U.S. at 363-64 (recognizing 42 U.S.C. § 12202 as an unequivocal expression of congressional intent); *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment).

such awards would presumptively be available against government entities absent express language exempting them.

C. Public Policy Supports Awards of Punitive Damages Against Municipalities under Title II and Section 504.

Even where the *Newport* presumption would otherwise apply, it may be overcome if the public policy concerns underlying it are outweighed by other policy considerations indicating a need for a punitive damages remedy under the particular statutory scheme at issue. *See Newport*, 453 U.S. at 266. Here, those policy concerns strongly support the availability of punitive damages against municipal governments.

Newport recognized the important role that punitive damages under 42 U.S.C. § 1983 play in deterring official misconduct. 453 U.S. at 268. Critical to the Court's decision not to permit such damages against governmental entities was its view that the "more effective" deterrent was the availability under Section 1983 of punitive damages directly against the particular officials who engaged in misconduct. *Id.* at 270. As the Court stated, "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations." *Id.* at 269; *see also Smith v. Wade*, 461 U.S. at 36 n.5 (emphasizing the importance of this rationale to the holding in *Newport*).

Given that both the ADA and the Rehabilitation Act are aimed at *eliminating* discrimination against people with disabilities in the provision of public services by State and local governments, the importance of deterrence under those statutes is at least as critical as it is under Section 1983. Unlike Section 1983, however, Title II of the ADA and Section 505(a)(2) of the Rehabilitation Act have been held not to provide remedies directly against offending officials in their personal capacities. *See Garcia v. S.U.N.Y. Health Sciences*

Center, 280 F.3d at 107 ("Insofar as Garcia is suing the individual defendants in their individual capacities, neither Title II nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials.") (collecting cases). Because the ostensibly "more effective" deterrent is apparently unavailable under Title II and Section 504, these statutes (unlike Section 1983, which was at issue in *Newport*) must depend for their deterrent effect on the remedies they provide directly against the entities to which they apply. Foreclosing punitive damages would materially interfere with the statutes' goal of making violation more costly than compliance.

Moreover, the countervailing policy concern that the Court found decisive in *City of Newport*—namely, the undesirability of penalizing innocent taxpayers for acts of misconduct by public officials from which the taxpayers have derived no benefit, *see* 453 U.S. at 266, 270—is largely absent here. The affirmative obligations imposed on public entities by Title II and Section 504 often have costs attached: modifying facilities, acquiring appropriate vehicles and other equipment, and training personnel so that people with disabilities are not denied the full benefits of public programs and services.[20] Unlike other civil rights statutes, violations of Title II will frequently stand to benefit taxpayers (at least in the short term) to some degree. The cost of compliance will likely exceed the costs that may be imposed in the few instances when a plaintiff sues for a violation and is able to establish that he has suffered actual damages.[21]

[20] As Arlene Mayerson, one of the architects of the ADA, has put it, "access can often cost money." Mayerson & Yee, *The ADA and Models of Equality*, 62 Ohio St. L.J. 535, 541 (2001). As the ADA's legislative history reflects, the enacting Congress recognized that "the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative." H.R. Rep. No. 101-485(III), at 50 (1990).

[21] Moreover, injunctive relief, which could directly prevent future violations, may not be available to plaintiffs who cannot establish a likelihood that they will be subjected to the same unlawful conditions in the future. Here, for example, respondent Gorman's injuries resulted from his treatment following an arrest—events that this Court's decisions suggest would be insufficient to provide him Article III standing to seek prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *see, e.g., Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001) (plaintiffs lacked standing to seek injunctive relief concerning inaccessibility of courthouse in absence of evidence they were likely to visit it again).

(*Footnote continued*)

To the extent such occasional damages awards fall short of the costs of actual compliance, they may be viewed by local governments as an acceptable cost of doing business, and taxpayers may benefit from reduced government expenditures attributable to ongoing failures to bring local government services into compliance with the Act. Similarly, taxpayers derive a windfall when, as in this case, local governments receive federal funding for many years without complying with their obligations under Section 504. Thus, unlike the situation in many Section 1983 lawsuits such as *Newport*, denying punitive damages will tend to under-deter violations significantly. Conversely, awarding them in appropriate cases, far from unfairly penalizing innocent taxpayers, will help to ensure that local government constituents do not benefit from their governments' unlawful conduct.

Newport's basic concerns thus have no application here, even if the Court entertains the *Newport* issue, now being raised in this Court for the first time in this 10-year-old litigation. Congress' clear intention to provide Title II plaintiffs with the full panoply of remedies, coupled with the important deterrent role punitive damages may play in advancing the sweeping policies of the ADA, compel rejection of petitioners' arguments that they should be insulated against punitive damages regardless of the nature of their conduct.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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March 29, 2002

Supreme Court, U.S.
FILED

APR 15 2002

OFFICE OF THE CLERK

No. 01-682

In the Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

I. Like The Eighth Circuit, Respondent Puts A Thumb On The Wrong Scale: Punitive Damages Are Presumptively *Not* Available In This Case

As we showed in our opening brief (at 17-23, 23-25), two fundamental principles of law – the Spending Clause constraints reflected in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and the immunity from punitive damages enjoyed by municipal governments reflected in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) – require a presumption that punitive damages are *not* available in this case. Respondent's effort to elude that presumption, and advance the *contrary* presumption based on *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), is unavailing.

A. Spending Clause Principles Are Fully Applicable To The Statutes At Issue In This Case

1. According to respondent, Spending Clause principles limit only the "*type of conduct* for which defendants may be held liable under Spending Clause legislation," not "the *form of relief*" available to a successful plaintiff. Resp. Br. 37 (emphasis in the original). That is simply not so. "By insisting that Congress speak with a clear voice," Spending Clause principles "enable the States [or municipalities] to exercise their choice knowingly, cognizant of *the consequences* of their participation" in a federal grant program. *Pennhurst*, 451 U.S. at 17 (emphasis added). Plainly enough, the damages that may be imposed on a grant recipient for breaching its obligations are among "the consequences" – perhaps among the most severe consequences – that may attend participation in a federal program. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting) ("Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to accept federal funds"). This Court has accordingly held that the "contractual nature" of a given statute "has implications" not only for the type of conduct that may be treated as a breach, but also "for our construction of *the scope of available remedies*." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287

(1998) (emphasis added). After all, the Court has explained, the "central concern" of Spending Clause principles "is with ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'" *Ibid.* (quoting *Franklin*, 503 U.S. at 74). Whether a recipient may be held "liable for a monetary award" obviously turns not only on the "type of conduct" for which liability may be imposed, but also on what types of "monetary awards" are available.

Respondent contends (at 38), however, that if Spending Clause constraints extend to remedies, and not just to conduct, then even compensatory remedies – and perhaps even private causes of action themselves – may be suspect. Respondent notes that where a court implies a private cause of action or a compensatory damages remedy, it cannot "be said that the funding recipient was clearly on notice that its conduct would subject it to the particular relief at issue." *Ibid.* There is some force to that view; "[w]hether the Court ever should have embarked on this endeavor under a Spending Clause statute is open to question" (*Davis*, 526 U.S. at 685 (Kennedy, J., dissenting)). But there is not much to be said for respondent's invitation to take the next, rather considerable step down the same path and infer a right to exact a private punishment under a Spending Clause statute. To the contrary, the Court has, in its most recent decisions, "retreated from [its] previous willingness" to imply and extend causes of action where Congress has not affirmatively spoken. *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 519 n.3 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001).

And punitive damages are a very good place to "draw the line" (Resp. Br. 38). For one thing, as we explained in our opening brief (at 22) – and as respondent does not dispute – punitive damages are *not* a permissible remedy for a common law breach of contract. Because "legislation enacted pursuant to the spending power is much in the nature of a contract" (*Pennhurst*, 451 U.S. at 17), the "contractual framework" (*Gebser*, 524 U.S. at 286) itself forecloses resort to punitive damages.

Punitive damages, it should be added, are especially ill-suited to a contractual regime. "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, * * * the impact of these windfall recoveries is unpredictable and potentially substantial." *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 50 (1979). But an "unpredictable" and yet "potentially substantial" damages liability is precisely what contractual principles forbid. Grant recipients are entitled "to exercise their choice knowingly, cognizant of the consequences of their participation" (*Pennhurst*, 451 U.S. at 17). They don't want surprises.

Punitive damages are also likely to be duplicative of compensatory awards under a Spending Clause statute. As the Court explained in *Gebser*, and again in *Davis*, to award even compensatory damages for breaches of a Spending Clause obligation requires proof that the grant recipient "intentionally acted in clear violation" of the statute. *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 290). But there is little daylight, as a practical matter, between "intentional acts" that are "in clear violation" of law and acts taken with "malice" or "reckless indifference to plaintiff's rights" – which was the standard by which respondent secured $1.2 million in punitive damages over and above the $1 million he received in compensatory damages. JA 72. Put another way, conduct that is sufficiently "intentional" to warrant compensatory relief is likely always to be subject to punitive exactions as well.

In respondent's view, however, "this Court expressly held in *Franklin* that the Spending Clause principles articulated in *Pennhurst* * * * d[o] *not* limit the relief available for intentional violations of Spending Clause-based civil rights legislation." Resp. Br. 37. As respondent sees it, the Spending Clause exerts no gravitational force at all "in cases involving intentional civil rights violations." But *Franklin* says no such thing. The question presented in *Franklin* was whether, under *Pennhurst*, there could be *no monetary damages at all* for a violation of a Spending Clause statute. See U.S. Br. 12. The Court held that in a case in which intentional conduct is alleged, the "notice problem does not arise," and thus monetary relief in

some form is potentially available. Nowhere, however, did the Court intimate that punitive damages in particular might be awarded. To the contrary, as we explained in our opening brief (at 25-29), and as we reiterate below (at 8-12), *Franklin* has no bearing at all on punitive, as opposed to compensatory, damages.[1]

2. Respondent's remaining challenge to the application of Spending Clause principles may be dispatched more briefly. In his view, "[w]hatever limits the Spending Clause may place on relief under statutes passed on its authority" – such as Section 504 of the Rehabilitation Act – "there is no basis for importing those constitutional limits into the ADA, a statutory scheme based on sources of authority to which limits on the spending power are irrelevant." Resp. Br. 38. Although respondent recognizes that Title II of the ADA expressly "adopts the Rehabilitation Act's remedial scheme," he asserts that it did so without carrying with it the "Spending Clause limitation[s]" attached to that remedial scheme. That's some trick, and respondent provides no indication of how it was performed. What Title II in fact "imported" (Resp. Br. 39) were "[t]he remedies, procedures, and rights set forth in" Section 504 – a Spending Clause statute – which in turn incorporated "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" – another Spending Clause statute, whose remedial scheme is the product of judicial implication. Had Congress intended to borrow only the literal language of those statutes, stripped of the legal context in which they were enacted, presumably it would have said so (assuming the English language is suited to the task). It did not.

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[1] Nor was there the slightest suggestion in *Davis* that whenever the grant recipient "intentionally engaged in the unlawful conduct" (Resp. Br. 36), "the full range of appropriate relief" – including, by respondent's lights, punitive damages – is "available under *Franklin*." *Davis* had no occasion to define – indeed it did not even address – what types of damages might be awarded in an action under a Spending Clause statute.

B. The Immunity Principle in *City of Newport* Strengthens The Presumption Against Punitive Damages In This Case

This Court's decision in *City of Newport* held that Congress did not intend to authorize awards of punitive damages against a municipal government in an action brought under 42 U.S.C. § 1983. The Court detailed the long tradition in American law – continuing to this day – of affording municipal governments immunity from punitive liability. 453 U.S. at 259-63. As we explained in our opening brief (at 23-25), this background principle of governmental immunity recognized in *City of Newport* is no less informative in discerning Congress's intent concerning the availability of punitive damages in actions brought under Section 504 of the Rehabilitation Act and Section 202 of the ADA.

1. Respondent first contends that this Court should refuse to consider *City of Newport* altogether. Respondent recites the general rule that this Court will not "'ordinarily consider'" "'issues that are neither raised nor considered by the Court of Appeals.'" *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 213 (1998) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Respondent maintains that the "*Newport* point" was an "issue" that was "neither argued nor decided" below. Resp. Br. 41. *City of Newport*, says respondent, should therefore be ignored.

Respondent's suggestion misses the mark. We have no quarrel with the rule of prudence that respondent states, but the rule has no application here. The *issue* we raised in this case concerns the interpretation of the ADA and Rehabilitation Act; our *claim* is that petitioners do not have to pay respondent punitive damages. The argument about *City of Newport* is simply that – an *argument* as to how Title II and Section 504 should be interpreted, different from the other arguments, but directed at precisely the same *issue* or *claim*. This Court has never held that it should not address *arguments* not raised below, and for good reason. It would be passing strange if, for instance, this Court refused to interpret a statute according to its

text simply because the parties relied below only on legislative history. And it's no surprise that that is not the Court's rule.

The longstanding rule, rather, is that "[o]nce a federal claim is properly presented, a party can make *any argument* in support of that claim; parties are *not limited* to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphases added); accord *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000) (petitioner was in no way precluded from raising a new "argument in support of a claim," as opposed to "an independent claim"); see also, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14, 16 n.2 (1980) (addressing an *issue* not raised below because "the issue is squarely presented and fully briefed"; "the interests of judicial administration will be served by addressing the issue on its merits"). This case thus bears no resemblance to *Yeskey*, where the petitioners argued below that the ADA by its plain terms did not apply at all, but then added a new *issue* or *claim* before the Court, that the ADA as applied was unconstitutional. See 524 U.S. at 212-13.

Instead, this case is like *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). There, the petitioner argued before the lower courts that Amtrak was a private entity but nonetheless subject to First Amendment constraints; before this Court the petitioner argued that Amtrak was part of the federal government itself. Citing *Yee*, 503 U.S. at 534, and *Dewey* v. *City of Des Moines*, 173 U.S. 193, 198 (1899), the Court said that the latter contention was "not a new claim within the meaning of that rule [set out in *Yee*], but a *new argument to support what has been his consistent claim*," that Amtrak had violated the First Amendment. *Lebron*, 513 U.S. at 379 (emphasis added). So here. Petitioners have always claimed, and claimed only, that they are not required under the relevant statutes to pay punitive damages. The citation to *City of Newport* is simply another argument in support of that claim. This Court has no reason not to address it.[2]

2. On the merits, respondent contends (Resp. Br. 44-47) that Congress intended "to override" the *City of Newport* presumption when it abrogated State sovereign immunity under both Section 504 and under the ADA. But the provisions at issue make no mention of punitive damages (or municipalities, for that matter); and "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States* v. *Bestfoods*, 524 U.S. 51, 63 (1998). In any event, there is no basis for inferring an intent to extend punitive damages to municipal defendants. All these provisions purport to do is subject States to the same "remedies" that are "available for such a violation in an action against any public or private entity other than a State." But punitive damages are not "available" against *any* defendants under Section 504 or Title II. Indeed, only in 1991 were such awards extended to *any* Rehabilitation Act or ADA defendants – and even then, *only* under the employment provisions, and *not* against government defendants.

That is surely an odd way of "overriding" the presumption articulated in *City of Newport*.

C. Respondent's Contrary Presumption Rests On A Fundamental Misreading Of *Franklin*

Like the court below, respondent embraces exactly the opposite presumption in this case. Quoting from this Court's decision in *Franklin*, respondent asserts (at 14) that "'[t]he "existence of a statutory right implies the existence of all necessary and appropriate remedies."'" But respondent wrenches that

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[2] As respondent correctly points out (Resp. Br. 41-42), the reason petitioners did not rely on *City of Newport* below was that they contended that they were an instrumentality of the State, not a municipality. The Eighth Circuit rejected that view. And the Eighth Circuit's belief that it was "compel[led]" by its reading of *Franklin* makes it exceedingly unlikely that it would have reached a contrary decision had *City of Newport* been called to its attention.

language from the context of *Franklin* itself. For one thing, no claim for punitive damages was even advanced in *Franklin*. The question, instead, was whether damages *in any form* could be inferred under Title IX, in light of the fact that a decision not to recog[illegible]e a damages remedy "would leave petitioner" with "no remedy at all." 503 U.S. at 76; see *ibid.* (denial of damages relief would leave victim of sexual harassment "remediless"). The Court's guiding concern was that the absence of some form of damages remedy would "render inutile causes of action authorized by Congress." 503 U.S. at 74; see also *Doe* v. *County of Centre*, 242 F.3d 437, 456 (3d Cir. 2001) (explaining that the *Franklin* presumption "is rooted in the common law principle * * * that a right without a remedy is not a right at all"). Plainly, no such concerns are present here, as respondent received more $1 million in compensatory damages (which included $150,000 for pain and suffering). Pet. App. 21a.

Respondent also misapprehends the "long line of decisions" on which "*Franklin* rested." Resp. Br. 15. Although respondent recognizes (*ibid.*) that *Franklin* relied prominently on the decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), he overlooks the central premise of that case (even as he quotes the words themselves): "Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done*." 327 U.S. at 684 (emphasis added). That "compensation principle" (*International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 49-51 (1979)), of course, has nothing to do with punitive damages, which are awarded for purposes above and beyond "mak[ing] good the wrong done" (*Bell*, 327 U.S. at 684), such as "punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 568 (1996). And because "juries assess punitive damages in wholly unpredictable amounts," the awards typically "bear[] no necessary relation to the actual harm caused" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); yet remedying

"the harm caused" was precisely the point of the *Franklin* decision.[3]

Nor is there the slightest evidence in this Court's case law that "[t]he *Franklin* presumption is fully applicable to punitive damages." Resp. Br. 15. Respondent fails to identify a single case in which this Court inferred a punitive damages remedy under a Spending Clause statute – and we are unaware of any.[4] Even apart from Spending Clause cases as such, it is hard to square the proposition that punitive damages are "presumptively" available with cases like *Foust*, in which the Court, far from "presuming" anything about the availability of punitive damages, rejected an implied remedy of punitive damages under the Railway Labor Act because such an "extraordinary sanction" is not needed to satisfy the "compensation principle" that has traditionally informed the selection of appropriate remedies.

True, punitive damages are "'a firmly established feature of American law.'" Resp. Br. 15 (quoting *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 26 (1991) (Scalia, J., concurring in judgment)). The fact that *state* law embraces punitive damages as a remedy does not, however, authorize courts to infer a punitive damages remedy for the violation of a federal right when Congress is silent. To the contrary, even when it acts pursuant to grants of authority other than the Spending Clause, Congress

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[3] The fact that punitive damages may be characterized as a type of "remedy" (Resp. Br. 30) obviously does not mean that they are the type of remedy to which the presumption in *Franklin* extends. Only by denuding that case of its factual and legal context can respondent contend otherwise. Nor did this Court in *Smith* v. *Wade*, 461 U.S. 30 (1983), "reject precisely the argument now advanced by petitioners." Resp. Br. 30. That case construed 42 U.S.C. § 1983, a statute that "create[d] 'a species of tort liability'" and which therefore drew on "the common law of torts" (*id.* at 34). It said nothing about the kinds of remedies that may be inferred under a Spending Clause statute. And it certainly did not begin with a presumption that all remedies must be available when Congress explicitly says otherwise.

[4] Respondent's reliance (Br. 16) on cases involving constitutional torts is obviously misplaced.

ordinarily must speak clearly when it wishes to impose punishment. See, *e.g.*, *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959); *Elliott* v. *East Pa. R. Co.*, 99 U.S. 573, 576 (1878). And courts are appropriately reluctant to infer a punitive remedy because the exaction and calibration of punishment is quintessentially a legislative function. See *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998) ("judgments about the appropriate punishment for an offense belong in the first instance to the legislature"); *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, * * * these are peculiarly questions of legislative policy").[5]

In short, if *Franklin* effects a "presumption" at all, it is a presumption that compensatory damages may be inferred under Spending Clause statutes for injured parties who would otherwise be left without a remedy. It must be added, however, that this Court's more recent decisions have called into question even the limited presumption in *Franklin*. In addition to relying on *Bell* v. *Hood*, *Franklin* relied heavily on the Court's decision in *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), which it cited for the proposition that "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies." *Franklin*, 503 U.S. at 68. Respondent quotes that language (Resp. Br. 68), but fails to mention that the Court derived that "general rule" (503 U.S. at 68) from *Borak*. And the omission is telling, because this Court has quite explicitly "'abandoned' the view of *Borak* decades ago," and has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Correctional Servs. Corp.* v. *Malesko*,

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[5] Respondent cites (at 32) *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), as "holding that the burden is on a party opposing punitive damages 'to show that Congress intended to preclude such awards.'" He neglects to mention, however, that the question presented in *Silkwood* was *not* whether a punitive damages remedy could be judicially inferred under a federal statute (much less under a Spending Clause statute), but rather whether Congress intended the federal statute to preempt the availability of punitive damages under state tort law.

122 S. Ct. 515, 519 n.3 (2001). Accord *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

Finally, and in all events, the *Franklin* presumption – whatever its scope and continued vitality – has no bearing on claims brought under Section 504 of the Rehabilitation Act and Title II of the ADA.[6] As we explained in our opening brief (at 29-30), this Court's decision in *Lane* v. *Peña*, 518 U.S. 187 (1996), held that, because the Rehabilitation Act (whose remedies were adopted by Title II) "contains a provision labeled 'Remedies and attorney fees'"– and thus, unlike Title IX, is not "silent on the question of remedies"– the case therefore fell "outside the 'general rule' we discussed in *Franklin*." *Id.* at 197. True, the question presented in *Lane* was different: whether a remedy could be implied under Section 504 against a federal agency. But the *reasoning* of *Lane* applies to the present case with full force. "Title IX, the statute at issue in *Franklin*, made no mention of available remedies," and thus the Court felt free in *Franklin* to adopt a presumption to fill the breach. *Ibid.* Section 504, "by sharp contrast" (*ibid.*), contains a remedy provision. While that provision may not fully "delineate the scope of the relief available" (Resp. Br. 35) – although it *does* include a specific attorneys fee provision, which respondent notes in a reticent footnote (Br. 35 n.12) – the fact remains that Congress did not simply remain mute with regard to the question

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[6] Respondent asserts that "[t]he lower courts have broadly agreed that the *Franklin* presumption applies to punitive damages * * * under civil rights legislation such as Title VI, * * * Title II * * * and Section 504." Resp. Br. 32 n.11. Not so. For one thing, respondent inexplicably fails to cite anywhere in his brief an en banc court of appeals decision *directly contrary and directly on point*, *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996) (en banc), and one addressed repeatedly in our briefs and in the petition. For another, none of the cases that respondent cites in his footnote (save one) involved any one of those statutes; the one exception, *Burns-Vidlak* v. *Chandler*, 980 F. Supp. 1144 (D. Haw. 1997), is – for the reasons we have advanced in our briefs – wrongly decided. A district court decision in conflict with a court of appeals decision does not, to understate considerably, reflect any consensus among the lower courts.

of remedy. Under *Lane*, that should be enough to "bring[] this case outside the 'general rule' * * * discussed in *Franklin*." 518 U.S. at 197.

II. The Evidence Of Congressional Intent Does Not Overcome The Presumption Against The Availability Of Punitive Damages In This Setting

Far from overcoming the presumption against the availability of punitive damages, the evidence makes clear that Congress did not intend to authorize a punitive damages remedy in actions like this one.

A. Statutory And Regulatory Framework

The availability of quasi-criminal exactions, levied by lay juries possessed of substantial discretion, is manifestly inconsistent with the carefully calibrated remedial scheme created by Congress in Title VI (and incorporated by extension into the provisions at issue in this case). As we explained in our opening brief (at 31-34), Congress adopted significant procedural hurdles before the "*punishment* of cutoff of federal funds" (*Singh* v. *Superintending Sch. Comm.*, 601 F. Supp. 865, 867 (D. Me. 1985) (emphasis added)) may be imposed. In addition to the requirement that voluntary compliance be sought initially, Section 602 provides that, before the government may take an enforcement action that involves the termination of, or the refusal to grant or continue, financial assistance, "the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." 42 U.S.C. § 2000d-1. What is more, "[n]o such action shall become effective until thirty days have elapsed after the filing of such report." *Ibid.* Finally, Section 603 allows for judicial review of adverse administrative action taken under Section 602. 42 U.S.C. § 2000d-2.

Try as he might, respondent cannot square the imposition of an "unpredictable and potentially substantial" (*Foust*, 442 U.S. at 50) punitive damages remedy with this carefully wrought statutory scheme. It is one thing to decide, as this Court did in

Cannon and *Guardians*, that a private damages remedy *in some form* may be compatible with a system of federal enforcement. See Resp. Br. 26-28. It is quite another matter to assert that punitive damages – which are available with relatively few procedural constraints – may be reconciled with a statutory framework in which the most severe *express* remedy is cabined by elaborate safeguards. See *Gebser*, 524 U.S. at 289. Congress went to extraordinary lengths to ensure that grant recipients would not be punished absent notice, an opportunity to cure any deficiency, and the exhaustion of procedural hurdles. Punitive damages, by contrast, may be imposed if, after a single violation, a jury – "accorded broad discretion" (*Foust*, 442 U.S. at 50) – concludes that the violation in question is sufficiently egregious.

Punitive damages also effect a deep intrusion on administrative prerogatives. Whereas compensatory damages seek to address "an isolated violation" by "[t]he award of individual relief" (*Cannon*, 441 U.S. at 705), punitive damages are designed to punish and deter (*BMW* v. *Gore*, 517 U.S. at 568), and, as such, they focus on the systematic performance of the grant recipient. That is the government's function – not the province of lay jurors. Punitive damages may also dwarf the federal grant itself – and as the Solicitor General points out, the prospect of such awards may therefore "deter entities from accepting federal financial assistance" in the first place. U.S. Br. 26.[7] True, "even a compensatory damages award could exceed

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[7] Respondent speculates that "in the great majority of cases" an award of punitive damages "will likely not approach the amount of money a funding recipient receives from the federal government over time." Resp. Br. 28. The only support respondent offers for this prediction is a citation from this Court's *Guardians* case – which of course did not address punitive damages at all. To the contrary, the dissenting opinion of Justice Stevens – from which respondent quotes at length (*ibid.*) – states only that "'*an individualized remedy* for the victim of a Title VI violation'" is likely to be less drastic than the cutoff of federal funds. *Ibid.* (quoting 463 U.S. at 638-39 n.7) (emphasis added). In any event, a rational grant recipient will look not only at the likely recovery in any given case, but also at the *total* recoveries, compensatory and punitive, across all expected lawsuits. Those dollars may be daunting.

the amount of financial assistance a defendant receives" (Resp. Br. 28). But "in for a penny, in for a pound" is no way to run a federal grant program. Compensatory damages at least have the virtue of comparative predictability and "individualized" (*Guardians*, 463 U.S. at 638-39 n.7 (Stevens, J., dissenting)) calculation. Punitive damages, on the other hand, are notoriously hard to predict, both in frequency and amount.[8]

In respondent's view, however, "[t]he overall structure of the ADA" – though not Section 504 – "reveals that if Congress had intended to foreclose punitive damages under Title II, it would have done so expressly." Resp. Br. 19. In particular, respondent notes that whereas Title III, outlawing private-sector discrimination in connection with "public accommodations," forbids the Attorney General from seeking punitive damages, there is no such explicit prohibition in Title II. According to respondent, Title III "illustrates not only that Congress knew how to – and did – exclude punitive damages when it wanted to do so, but also, and more importantly, that Congress was aware that if it provided a right of action for 'monetary damages' and did *not* exclude punitive damages, the likely (and logical) inference would be that it intended to permit them." Resp. Br. 20. But an express prohibition of punitive damages (as in Title III) is not the only way of foreclosing resort to punitive damages; another way to accomplish the same result is to adopt the remedies of another statute (Title VI) that had uniformly been construed to preclude an award of punitive damages. See *infra* pages 15-16. As for the suggestion that a reference to "monetary damages" otherwise conveys the availability of punitive damages absent a specific exclusion, the short answer is that Title II *does not refer to "monetary damages" at all* – it refers to Section 504, which in turn refers to Title VI. Neither of those provisions mentions "monetary damages" at all.

[8] Recognizing, perhaps, that punitive damages are impossible to square with the procedural protections of Title VI, respondent contends that "[b]ecause Title II is not limited to federally funded activities, its remedies need hardly be measured against the irrelevant enforcement mechanism of a cutoff of federal funds." Resp. Br. 26. Once again, however, Title II explicitly adopts the remedies prescribed by Section 504, which in turn adopts the remedies of Title VI.

B. The Prevailing Judicial Interpretation Of Title VI

As we explained in our opening brief (at 39), the ADA incorporates by explicit reference the "remedies, procedures, and rights" available under the Rehabilitation Act, which in turn incorporates the remedies available under Title VI. As the Eighth Circuit itself acknowledged, when Section 505 of the Rehabilitation Act was enacted (1978) and when the Act was thereafter amended (1986, 1987, and 1991), courts were "in near unanimity that [Title VI and Section 504] did not permit punitive damages." Pet App. 13a-14a; see also Pet. Br. 39-40.

Nothing respondent says refutes our argument. Respondent insists (at 11-12) that "damages" were available under Title VI and Section 504, citing a House Judiciary Committee report and some judicial decisions that were mentioned there. H.R. Rep. No. 101-485(III); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir. 1982); *Nelson* v. *Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983); *Fitzgerald* v. *Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (D. Iowa 1984). Respondent then points to the Report's seeming endorsement of language from *Nelson*, that Section 504 (and presumably Title VI) offered plaintiffs "a full panoply of remedies." *Id.* at 52. But *Miener* never even alluded to *punitive* damages (as opposed to compensatory damages). Nor does *Nelson* (despite mentioning "panoplies") hold that *punitive* damages (as opposed to compensatory damages) were a permissible remedy under Section 504. Even in *Fitzgerald*, where the district court *declined* to award punitive damages to a Section 504 plaintiff, the court said only (if incautiously) that punitive damages are "*presumably* available under § 504," 589 F. Supp. at 1138 (emphasis added).

In any event, a single reference in a single Committee Report from a single House of Congress hardly reflects "Congress's stated intent" on the question, as respondent would have it (Resp. Br. 44). See, *e.g.*, *Hoffman Plastic Compounds, Inc.* v. *NLRB*, No. 00-1595, slip op. at 11 n.4 (Mar. 27, 2002); *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264,

279 (1996) (Scalia, J., concurring in part and concurring in judgment). Rather, Congress expressly incorporated, in the text of Title II, the remedies of Section 504; and in Section 504, the remedies of Title VI. *Punitive* damages were not available to Section 504 plaintiffs; and the reason is that they were not available to Title VI plaintiffs. That rule – that punitive damages were not available – was the rule at all the relevant times.

C. The Civil Rights Act of 1991

As we noted in our opening brief, the Civil Rights Act of 1991, which added Section 1981a to Title 42 of the U.S. Code, created a limited and carefully defined right to seek punitive damages (subject to specified monetary caps based on the size of the offending employer) in certain actions brought for intentional discrimination in employment. The punitive damages provision applies to actions brought under Section 501 of the Rehabilitation Act, 29 U.S.C. § 791, and Section 102 of Title I of the ADA, 42 U.S.C. § 12112. Significantly, it does *not* apply to actions brought under Section 504 or 202. Moreover, the 1991 Act *expressly exempts* from punitive liability under its new provisions any "government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1); see also *County of Centre*, 242 F.3d at 457. Even the court below recognized that inferring a punitive damages remedy under Title II of the ADA "turns * * * on its head" Congress's evident intent in the 1991 legislation. Pet. App. 15a.

None of this gives respondent any pause, however, because, in his view, while the 1991 amendments expanded the "expressly limited" remedies available for employment discrimination, they shed no light on the remaining provisions – such as Section 504 and Title II of the ADA. Resp. Br. 20-24. "Indeed," respondent adds, "the framers of the 1991 Act were careful *not* to limit punitive damages remedies that already existed under the civil right laws." *Id.* at 23. This argument simply makes no sense of the statutory materials. As a result of the 1991 amendments, Title I now includes *an express* authorization of punitive damages, but (I) applicable *only* to employment cases, (ii) capped at $300,000, and (iii) explicitly unavailable when the

defendant is a governmental entity. Yet according to respondent, Title II – which was *not* amended to include punitive damages; which incorporated remedy provisions that had *never* been construed to permit punitive damages; and which covers *only* actions against governmental entities – should nevertheless be construed to *permit* an award of punitive damages in cases like this. Can that possibly be?

D. Respondent's Reliance On "The Policies" Of Title II and Section 504 Is Misplaced

Bereft of textual support, respondent invokes "the policies of Title II and Section 504" as a basis for permitting punitive damages. To begin with, courts are not generally authorized, in the name of "policy," to infer a punitive damages remedy, especially under a Spending Clause statute. This Court has "sworn off the habit of venturing beyond Congress's intent," even in aid of doing what seems "'necessary to make effective the congressional purpose.'" *Alexander* v. *Sandoval*, 121 S. Ct. at 1520. Statutes can and do serve an array of "purposes" or "policies" – often competing ones that have been compromised in the service of consensus. See Frank H. Easterbrook, *Foreword: The Supreme Court, 1983 Term: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984). Choosing among them, and then deciding how best "to make effective the congressional purpose," is an "understanding of private causes of action that held sway 40 years ago" – but no longer. *Alexander* v. *Sandoval*, 121 S. Ct. at 1520.

In any event, respondent's policy arguments make a hash of the two statutes. While punitive damages doubtless "mak[e] it more expensive to violate the Act," it hardly "advance[s] the ADA's policy of eliminating discrimination against people with disabilities" to threaten grant recipients with large, and highly unpredictable, punitive damages awards. Resp. Br. 25. For one thing, Section 504 and Title II, by their terms, already contain significant deterrents against violations through the cutoff remedy. Compensatory damages are also a powerful deterrent in their own right. See, *e.g.*, *Memphis Community Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310 (1986) (noting that the Civil Rights

Act of 1871 "presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations"). In the present case, for example, respondent was awarded $1 million in compensatory damages, including $150,000 on account of pain and suffering. Pet. App. 21a.[9]

Of course, there can always be *more* deterrence through heftier and more unpredictable damage awards. But "[d]eterrence is a function of degree, and nothing in the Rehabilitation Act or in the case law commands that it be maximized at all costs." *Lussier* v. *Runyon*, 50 F.3d 1103, 1112 (1st Cir. 1995). As the Solicitor General explains in greater detail (Br. 24-28), the threat of punitive damages is likely to frustrate the programmatic objectives of the statutes and, in the case of Section 504, "perhaps even deter entities from accepting federal financial assistance" in the first place. *Id.* at 26. At a minimum, the imposition of large awards will siphon money away from the programs themselves. More generally, saddling municipalities with sizeable awards of punitive damages places a "strain on local treasuries and therefore on services available to the public at large." *City of Newport*, 453 U.S. at 271. And, it need hardly be added, inferring a right to punitive damages will spawn additional litigation, as inventive litigants and their lawyers (see, *e.g.*, Amicus Brief of the Ass'n of Trial Lawyers of America and AARP in Support of the Respondent) explore the contours and content of this unprecedented remedy.[10]

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[9] "Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 438 n.11 (2001); see also Amicus Brief of the Int'l City/County Mgmt. Ass'n, et al., at 25 (punitive damages served historically as "a partial remedy for the defect in civil procedure which denies compensation for actual expenses of litigation, such as counsel fees" – a defect remedied by Section 505 of the Rehabilitation Act). As the scope of compensatory relief has widened, the "policy" reasons for exacting punitive damages as well lose force.

[10] Even now, respondent warns that "in a proper case" courts will next have to consider whether "an award of punitive damages might be limited by consideration of the amount of federal financial assistance received by a defendant and/or the financial gain reaped by the defendant through noncompliance with federal law." Resp. Br. 29 n.10. The "proper case," of course, is typically the next one following the creation of the underlying remedy.

All of these are reasons to leave the determination of punishment where it belongs – with Congress. Congress is best suited – and is constitutionally charged – with deciding whether punishment is warranted and, if so, how much. It discharged that function in 1991 when it added a punitive damages provision to the Rehabilitation Act and to the ADA, but calibrated the awards, capped the amounts (at no more than 25% of the award given to respondent), and exempted governmental actors. It has likewise discharged that function in a wide array of federal statutes that expressly contain punitive damages provisions. See Amicus Brief of the Int'l City/County Mgmt. Ass'n, et al., at 8-9 & n.2. Courts have no authority under Section 504 and Title II to play a similar function.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APRIL 2002

Supreme Court, U.S.
FILED
FEB 27 2002

No. 01-682

In the Supreme Court of the United States

KAY BARNES, ETC., ET AL., PETITIONERS

v.

JEFFREY GORMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a punitive damages remedy may be imputed to Congress in an inferred private right of action.

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In the Supreme Court of the United States

No. 01-682

KAY BARNES, ETC., ET AL., PETITIONERS

v.

JEFFREY GORMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The court of appeals upheld the award of $1.2 million in punitive damages against petitioners in this action under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 (1994 & Supp. V 1999), and Section 202 of the Americans with Disabilities Act of 1990 (Section 202), 42 U.S.C. 12132. The United States has a substantial interest in the scope of the remedies available under those statutes. Section 504 applies solely to programs or activities receiving federal financial assistance. The United States has an interest in assuring that judicially inferred remedies do not unduly interfere with the operation of such programs or activities, or with enforcement actions taken by the Depart-

ment of Justice or other agencies with respect to Section 504 or Section 202.[1]

STATEMENT

1. a. This case arises against the backdrop of interrelated civil rights statutes that prohibit discrimination on the basis of disability. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes the funding of vocational and certain other services for the disabled. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). Section 504 of the Act prohibits discrimination on the basis of disability under any "program or activity" receiving federal financial assistance. 29 U.S.C. 794(a) (1994 & Supp. V 1999). Section 505(a)(2), which was added in 1978, provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [Title VI] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under [Section 504]." 29 U.S.C. 794a(a)(2). Although Section 505(a)(2) provides a textual reference to private claims, it does so by reference to the judicially inferred right of action in Title VI. Principles governing the scope of remedies for inferred rights of action therefore apply in determining the scope of the remedies available in an action under Section 504.

Title VI, in turn, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. 2000d-1. Its express means of enforcement is administrative. Title VI directs agencies that distribute financial assistance to develop requirements to effectuate the statute's non-discrimination principle, and authorizes agencies to enforce those requirements by terminating or refusing to grant financial assistance, or by "any other means authorized by law." 42 U.S.C. 2000d-1(2); see 28 C.F.R. 42.106-42.110. Title VI does not expressly provide a private enforcement mechanism. This Court, however, has inferred a private right of action to enforce Title VI, see *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983), and has stated in the parallel context of Title IX that money damages are available in such an action. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 68, 70 (1992).[2]

The Department of Justice has promulgated regulations implementing Section 504, which are modeled on and incorporate aspects of the Title VI enforcement scheme. See 28 C.F.R. 42.501 to 42.505, 42.530. The regulations require applicants for federal financial assistance to provide assurances that the program or activity receiving such assistance will comply with Section 504. 28 C.F.R. 42.504(a). The regulations also establish a procedure for individuals to file administrative complaints with the funding agency. 28 C.F.R. 42.107(b). If the agency finds a violation of Section 504, the funding recipient may be required to "take the remedial action the Department considers necessary to overcome the effects of the discrimination." 28 C.F.R. 42.505(a). The regulations make clear that a recipient's failure to comply with Section 504 may cause the United States to bring a civil

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[1] The United States participated as an amicus in the lower court proceedings in this case, and argued that Section 202 and Section 504 cover the conduct of law enforcement officers pursuant to an arrest, and that, if true, the facts alleged by respondent in this case were sufficient to state a claim under those provisions. The federal government did not take a position in the courts below on the question presented in this Court.

[2] *Franklin* involved an inferred private cause of action under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681(a). Title IX prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance, *ibid.*, and was modeled on Title VI. See *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001). This Court has stated that Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

action against it, to terminate the recipient's federal financial assistance, or to take other measures. 28 C.F.R. 42.108(a).

b. Title II of the Americans with Disabilities Act of 1990 (ADA), unlike Section 504, is not conditioned on the receipt of federal funds. Accordingly, Section 202 of the ADA prohibits discrimination on the basis of disability in *any* public program, activity, or service, not just those that receive federal financial assistance. 42 U.S.C. 12132. Nonetheless, Section 203 of the Act provides that "[t]he remedies, procedures, and rights set forth in [Section 505(a)(2) of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Section 202]." 42 U.S.C. 12133. As a result, the same principles that govern the scope of the remedies available under Section 504 govern the remedies under Section 202. The Department of Justice has adopted regulations implementing Section 202, which, among other things, permit individuals to file complaints with the Department of Justice or other appropriate federal agency. See 28 C.F.R. 35.170. The regulations further authorize the Department of Justice to investigate and resolve the complaint, and to refer it for judicial action. 28 C.F.R. 35.174; 28 C.F.R. Pt. 35, App. A.

c. Separate provisions of the Rehabilitation Act, 29 U.S.C. 791 (1994 & Supp. V 1999) (Section 501), and the ADA, 42 U.S.C. 12112(a) (Section 102), prohibit discrimination on the basis of disability in employment. In 1991, Congress expressly authorized the award of punitive damages in actions alleging intentional employment discrimination in violation of those provisions. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In doing so, however, Congress specified that punitive damages are available in such actions only if the plaintiff shows that the employer acted "with malice or with reckless indifference" to federal law, and even then, punitive damages are capped at an amount

ranging from $50,000 to $300,000 depending on the employer's size. 42 U.S.C. 1981a(b)(1) and (3). In addition, Congress specified in the 1991 Act that punitive damages are not available in such actions when the defendant employer is "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

2. a. Respondent is a paraplegic who uses a wheelchair and lacks voluntary control over his lower torso and legs, including his bladder. In May 1992, he was arrested following an altercation with a bouncer at a nightclub in Kansas City, Missouri. After his arrest, respondent was denied permission to use the restroom to empty his urine bag before being transported to the police station. He was taken to a police van that had no wheelchair locks. Over respondent's objection, police officers removed respondent from his wheelchair, and fastened him to a narrow bench in the back of the van. During the ride to the police station, respondent fell from the bench and ruptured his urine bag. After these events, respondent began experiencing serious medical problems, including a bladder infection, lower back pain, uncontrollable spasms in his paralyzed area, and shoulder problems. His injuries left him unable to work full-time. Pet. App. 2a-4a.

b. In May 1995, respondent filed this action against petitioners—members of the Kansas City Board of Police Commissioners—and certain others, in the District Court for the Western District of Missouri, seeking compensatory and punitive damages for injuries that he sustained in connection with his May 1992 arrest. Respondent claimed that, on the basis of his disability, he had been excluded from participation in or denied the benefits of the programs or activities of the Kansas City Police Department, a recipient of federal financial assistance, in violation of Section 504 and Section 202. Following a three-day trial in April 1999, a jury found petitioners liable and awarded respondent $1,034,817 in

compensatory damages and $1,200,000 in punitive damages. Pet. App. 4a.

c. The district court vacated the punitive damages award on the ground that punitive damages are not available under Section 504 or Section 202. Pet. App. 21a-27a. In so holding, the court "look[ed] to the state of the law at the time the Rehabilitation Act was passed and the course of events that followed its passage." *Id.* at 25a. In particular, the court pointed to the fact that lower courts have consistently held that punitive damages are not available under Section 504 or Section 202, and that—even though it has amended those provisions on several different occasions—Congress has never "indicate[d] any desire to change the established understanding that punitive damages were not available under § 504." *Id.* at 26a. In addition, the district court noted that in 1991 Congress "made punitive damages available—for the first time—under [Section 501 of the Rehabilitation Act and Section 102 of the ADA]," but "did not extend the new punitive damages provision to § 504 [or Section 202]." *Ibid.*

3. The court of appeals reversed the district court's punitive damages ruling and remanded for further proceedings. Pet. App. 1a-20a. The court stated that it was "sympathetic" to the position that punitive damages should not be available in an action under Section 504 or Section 202, but it concluded that this Court's decision in *Franklin* v. *Gwinnett County Public Schools* "foreclosed" that result. Pet. App. 8a.

The court of appeals pointed to this Court's statement in *Franklin* that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Pet. App. 9a. Next, the court stated that punitive damages are "appropriate remedies" within the meaning of *Franklin* because such damages are among the remedies "usually available to American courts." *Id.* at 10a. And, as a result, the court concluded that

"*Franklin* compels the conclusion that absent express congressional statement to the contrary," an implied private cause of action "affords all appropriate remedies, *including punitive damages*." *Ibid.* (emphasis added).

Applying that understanding to this case, the court of appeals reasoned that *Franklin* requires it to "conclude that Congress assumed the availability of all remedies, including punitive damages, under Title VI"; that "Congress extended the remedies available under Title VI to [Section 504 and Section 202]"; and that, "[t]herefore, logic dictates, the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202." Pet. App. 11a, 12a.

The court of appeals remanded to allow the district court to determine whether the award of punitive damages was appropriate in this "specific case," explaining that—even though punitive damages are generally available in Section 504 and Section 202 actions—the evidence would not support punitive damages unless it showed that petitioners' conduct was "motivated by evil motive or intent, or . . . reckless or callous indifference to the federally protected rights of [respondent]." Pet. App. 16a (quotation omitted).

SUMMARY OF ARGUMENT

A court should not impute to Congress an intent to allow a punitive damages remedy absent a clear congressional directive.

I. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court approved the award of compensatory damages in a Title IX action based on a presumption in favor of "the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66. Neither *Franklin*'s terms nor the cases on which it relied, however, support a presumption in favor of the availability of *punitive* damages. *Franklin* was grounded on decisions recognizing that federal courts may "*redress* injuries action-

able in federal court." *Ibid.* (emphasis added). The purpose of punitive damages, however, is not to redress injuries, but instead "to exact punishment *in excess of* actual harm." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (emphasis added). By their very nature, punitive damages are not necessary to redress wrongdoing.

In the absence of clear congressional guidance, the proper presumption is the opposite of that applied by the court of appeals below. That is, courts should not infer a punitive damages remedy "[a]bsent clear congressional guidance." *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 52 (1979); see *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). That approach takes into account the penal nature and significant practical consequences of punitive damages, and recognizes that the decision whether to authorize punitive damages is better suited to legislative judgment. In addition, the presumption *against* judicial inference of a punitive damages remedy is consistent with this Court's refusal to expand the scope of inferred rights of action. *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

II. The court of appeals erred in inferring a punitive damages remedy with respect to actions under Section 504 or Section 202, because there is no clear guidance that Congress intended to allow for punitive damages in those actions and, in fact, the evidence strongly supports the opposite conclusion. The Rehabilitation Act incorporates the remedies under Title VI, 29 U.S.C. 794a(a)(2), which, in turn, is silent with respect to punitive damages. At the time Congress cross-referenced the remedies available under Title VI lower courts had repeatedly refused to recognize punitive damages in Title VI cases. In 1991, Congress adopted a *limited* punitive damages remedy under provisions of the Rehabilitation Act and the ADA, but only against non-government actors and only for certain employment discri-

mination claims. Once again, Congress was mum with respect to the availability of punitive damages under Section 504 or Section 202.

Other considerations also weigh against inferring a punitive damages remedy with respect to Section 504 or Section 202. Any need for a punitive damages remedy as a deterrent is offset by the existence of administrative enforcement weapons, including the ability to terminate federal funding with respect to Section 504. At the same time, the availability of an inherently unpredictable punitive damages remedy could frustrate the achievement of programmatic goals under Section 504, and perhaps even discourage entities from accepting federal financial assistance. The imposition of such awards also could divert resources from the advancement of programmatic objectives. For these reasons, decisions about whether to impose penalties for non-compliance with conditions on federal funding are best left to the federal government, rather than delegated to juries.

Inferring a punitive damages remedy under Section 504 or Section 202 would be particularly inappropriate with respect to government actors such as petitioners here. When Congress adopted a limited punitive damages remedy in 1991 for other provisions of the Rehabilitation Act and the ADA, it expressly exempted government actors from that remedy. 42 U.S.C. 1981a(b)(1). In addition, the longstanding "presumption [is] *against* imposition of punitive damages on governmental entities." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (emphasis added). Exposing governments to punitive damages may visit retribution on blameless or unknowing taxpayers, while siphoning off funding from other objectives.

ARGUMENT

A PUNITIVE DAMAGES REMEDY SHOULD NOT BE JUDICIALLY INFERRED IN THE ABSENCE OF A CLEAR CONGRESSIONAL DIRECTIVE

Under our Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981); see U.S. Const. Art. III. Except in certain areas such as admiralty or maritime, the Constitution does not contemplate that federal courts will fashion substantive rules of law. See *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997); *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-646 (1981). In rare circumstances, this Court has inferred "a cause of action where Congress has not provided one." *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 519 n.3 (2001). But the Court has recently stated that it has "abandoned" the understanding that led to the creation of such inferred rights. *Ibid.*; see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), concerned the remedies available in the cause of action inferred from Title IX. See *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). In particular, *Franklin* considered whether that inferred statutory action "supports a claim for monetary damages," as opposed solely to injunctive relief. 503 U.S. at 63. In answering that question, the Court stated that "[t]he general rule * * * is that *absent clear direction to the contrary by Congress*, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," including in a judicially inferred action. *Id.* at 70-71 (emphasis added). Finding no contrary statutory directive,

the Court held that "a damages remedy is available for an action brought to enforce Title IX." *Id.* at 76.

In this case, the court of appeals held that *Franklin* compelled the conclusion that punitive damages are available under Section 504 or Section 202, because Congress has not stated a contrary rule. That understanding was mistaken. *Franklin* does not address the availability of punitive damages in an implied private action, and its reasoning does not extend that far. Punitive damages pose vastly different considerations than compensatory damages. Indeed, this Court has held that a punitive damages remedy should *not* be inferred "[a]bsent clear congressional guidance" to the contrary. *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 52 (1979). That presumption, and not the one in *Franklin*, should govern the remedy issue in this case. The presumption *against* punitive damages means that punitive damages are not available under Section 504 or Section 202, because there is no evidence, much less any clear guidance, that Congress intended to authorize such damages.

I. THE PROPER PRESUMPTION IN THE ABSENCE OF CLEAR CONGRESSIONAL GUIDANCE IS AGAINST INFERENCE OF A PUNITIVE DAMAGES REMEDY

A. Punitive Damages Are Not Within The *Franklin* Ambit

Punitive damages are an "extraordinary sanction." *Foust*, 442 U.S. at 48. "[B]y definition [they] are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981); see K. Redden, *Punitive Damages* § 2.1, at 24 (1980) (Punitive damages "run[] counter to the normal reparative function of tort and contract remedies."). Thus, punitive

damages "have been described as 'quasi-criminal,'" and "as 'private fines.'" *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). "Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting).

The threshold issue in this case is whether punitive damages are subject to *Franklin*'s presumption of "availability * * * unless Congress has expressly indicated otherwise." 503 U.S. at 66. For several reasons, it is clear that they are not.

1. *Franklin* did not involve a *punitive* damages remedy and, therefore, the Court in that case had no occasion to consider, much less decide, the question presented here. The question presented in *Franklin* was whether Title IX "allows victims of intentional discrimination to recover *compensatory* damages." 90-918 Pet. at i (emphasis added). The decision makes no reference to punitive damages and, instead, addresses whether federal courts may imply a damages "remedy to make good the wrong done." *Franklin*, 503 U.S. at 66, 76. That is the essence of the compensatory damages remedy, whereas "punitive damages are specifically designed to exact punishment *in excess of* actual harm." *Cooper Indus.*, 532 U.S. at 432 (emphasis added).

Furthermore, in holding that a compensatory damages remedy was available to avoid leaving the plaintiff in *Franklin* "remediless," *Franklin*, 503 U.S. at 76, the Court did not make presumptively available "the full panoply of remedies * * *, including punitive damages." Pet. App. 12a. As this Court has explained, *Franklin* was a "response to lower court decisions holding that Title IX does not support damages relief *at all*." *Gebser*, 524 U.S. at 284 (emphasis added). Accordingly, the Court "made no effort in

Franklin to *delimit* the circumstances in which a damages remedy should lie." *Ibid.* Nor did it *delimit* the types of damages that are—or are not—presumptively available.

2. Equally important, the logic of *Franklin* does not extend to the award of punitive damages, because none of the decisions on which *Franklin* rests supports the proposition that the existence of a federal right presumes that federal courts may infer a punitive damages remedy to *punish* violations of that right.

The Court's decision in *Franklin* is built on the Court's statement in *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done.*" *Franklin*, 503 U.S. at 66 (emphasis added). The Court explained that this "traditional presumption" was "well-settled" in this Court's precedents, and continued that "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies *to redress injuries* actionable in federal court." *Ibid.* (emphasis added). But it has also been clear from the earliest years of the Republic that the power to define crimes and "affix a punishment" to them belongs exclusively to "[t]he legislative authority of the Union." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Compensatory damages "make good the wrong done" and "redress injuries." Punitive damages, as their name suggests, serve objectives *beyond* redressing injuries. See *Cooper Indus.*, 532 U.S. at 432 ("compensatory damages * * * are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," whereas punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing").[3]

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[3] This Court's decisions leave no doubt about the penal nature of punitive damages. See *Tull* v. *United States*, 481 U.S. 412, 422 & n.7 (1987);

Accordingly, none of the cases from which this Court drew support in *Franklin*, 503 U.S. at 68, for the "general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies" involved a punitive damages remedy. See *id.* at 66-69. And that includes *Bell* v. *Hood* itself. See 327 U.S. at 684 (seeking damages "said to have been *suffered* as a result of federal officers violating the Fourth and Fifth Amendments") (emphasis added).[4] Nor is it surprising that the traditional rule

Memphis Cmty. Sch. Dist. v. *Stachura*, 477 U.S. 299, 306 n.9 (1986); see also *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting). As this Court has also recognized, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus.*, 532 U.S. at 438 n.11; see *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 422 n.2 (1994). This case, however, deals with a punitive damages remedy that is plainly penal in nature—$1.2 million on top of more than $1 million awarded in compensatory damages, which included damages for pain and suffering as well as for emotional anguish.

[4] See also *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) (suit to recover writ of mandamus); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (suit to recover credits or allowances on contracts for transportation of the United States mail); *Dooley* v. *United States*, 182 U.S. 222 (1901) (suit to recover back duties paid under protest); *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33 (1916) (suit to recover damages for personal injuries); *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) (suit to recover damages for securities violations); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (suit for "[c]ompensatory damages for deprivation of a federal right"); *Carey* v. *Piphus*, 435 U.S. 247 (1978) (addressing "recovery of damages * * * appropriate to compensate for injuries caused by the deprivation" of constitutional rights); see also *Davis* v. *Passman*, 442 U.S. 228, 248 (1979) (implying damages remedy so that if plaintiff "is able to prevail on the merits [of *Bivens* action], she should be able to redress *her* injury in damages, a 'remedial mechanism normally available in the federal courts'") (emphasis added); *Hayes* v. *Michigan*

on which *Franklin* rests is limited in that fashion. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." *Carey*, 435 U.S. at 254-255 (quoting 2 F. Harper & F. James, *Law of Torts* § 25.1, at 1299 (1956)); see *id.* at 255 n.7 (citing cases).[5]

To be sure, "[p]unitive damages have long been a part of traditional state tort law" in this country. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Although, as noted, even in that context, punitive damages often served a compensatory function "[u]ntil well into the 19th century." *Cooper Indus.*, 532 U.S. at 438 n.11; see note 3, *supra*. But whatever the tradition in state common law courts, there is

Cent. R.R., 111 U.S. 228, 240 (1884) ("[E]ach person specially injured by the breach of the obligation is entitled *to his individual compensation*, and to an action for its recovery.") (emphasis added). The discussion in *Texas and Pacific Railway* underscores the point. There, the Court cited to the "doctrine of the common law expressed in 1 Com. Dig., *tit.*, Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for *the recompense of a wrong done to him contrary to the said law.*'" 241 U.S. at 39 (emphasis added).

[5] That understanding is reflected in Blackstone's own writings. In discussing the "injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury," he stated that "the natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived." 3 W. Blackstone, *Commentaries* *115, *116. He continued: "This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded; or, where that is not a possible, or at least not an adequate remedy, *by making the sufferer a pecuniary satisfaction in damages*; as in case of assault, breach of contract, etc. to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury; though such right be not fully ascertained till they are assessed by the intervention of the law." *Id.* at *116 (emphasis added; footnote omitted).

no tradition in the federal courts of inferring not just a private right of action, but a punitive damages remedy to redress the violation of federal law. More fundamentally, when this Court has inferred judicial remedies, it has done so out of necessity. Rather than leave an individual "remediless" (*Franklin*, 503 U.S. at 76), this Court has provided remedies to victims for whom "it is damages or nothing." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Punitive damages, by definition, are damages in excess of those necessary to provide recompense. They provide a "windfall to a fully compensated plaintiff." *Fact Concerts*, 453 U.S. at 267. That defining feature of punitive damages puts them beyond the rationale of *Franklin*.

B. This Court's Cases Support A Presumption Against, Not For, Punitive Damages

1. In light of the unique nature of the punitive damages remedy, this Court has refused to infer the existence of a punitive damages remedy "[a]bsent clear congressional guidance" to the contrary. *Foust*, 442 U.S. at 52. The question in *Foust* was "whether the Railway Labor Act permits an employee to recover punitive damages for * * * a breach of a union's duty of fair representation." *Id.* at 43 (footnote omitted). As the Court noted, "[t]he right to bring unfair representation actions is judicially 'implied from the statute * * * ,' and Congress has not specified what remedies are available in these suits." *Id.* at 47 (citation omitted). In concluding that punitive damages are not available in such an action, the Court first discussed the "extraordinary" and penal nature of punitive damages. *Id.* at 48. The Court next observed that, "[b]ecause juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial." *Id.* at 50 (citation omitted). In addition, the Court noted "that punitive

damages may be employed to punish unpopular defendants," and could have other disruptive effects on labor relations. *Id.* at 50-51 n.14. "Absent clear congressional guidance," the Court concluded that it was unwilling to infer a punitive damages remedy and "inject such an element of uncertainty" into this area of labor law. *Id.* at 52.

In a situation like *Foust*, where Congress did not provide an express cause of action, "clear congressional guidance" that punitive damages are available will rarely be present. That is also true in the unusual context of the Rehabilitation Act and the ADA, which expressly incorporate remedies available under a cause of action that was itself judicially inferred. But even when Congress provides an express cause of action for which punitive damages are found to be available in certain circumstances, this Court has declined to recognize a punitive damages remedy against municipalities. See *City of Newport* v. *Fact Concerts, Inc.*, *supra*. Although the Court later confirmed the availability of punitive damages under the express cause of action in Section 1983, see *Smith* v. *Wade*, 461 U.S. 30, 34-38 (1983), the Court in *Fact Concerts* did not *presume* that punitive damages were available against municipalities unless Congress said otherwise, *i.e.*, it did not adopt a *Franklin* presumption. Instead, in *Fact Concerts*, the Court first looked to see whether there was any evidence that in enacting Section 1983, Congress had intended to override the "common-law tradition" that punitive damages were not available against a municipality. 453 U.S. at 261; see *id.* at 263-264. And then, the Court considered the practical ramifications of allowing punitive damages awards in this context and held that, "[a]bsent a *compelling* reason for approving such [awards]," it was "unwise to inflict the risk" associated with such awards. *Id.* at 271 (emphasis added).

In discussing the impact of punitive damages, the Court noted that "[p]unitive damages by definition are not in-

tended to compensate the injured party," and "that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort." 453 U.S. at 266, 267. "Indeed," the Court continued, "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 267. The Court also rejected the argument that punitive damages are needed to deter misconduct, noting, for example, that there is "no reason to suppose that corrective action, such as the discharge of offending officials * * * , will not occur unless punitive damages are awarded against the municipality." *Id.* at 269. Moreover, whatever benefits might flow from a punitive damages remedy, the Court recognized that "the costs may be very real," as a result of "unpredictable and, at times, substantial" awards that place a "strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-271.

2. In this case, the Court should make clear that *Franklin* does not extend to punitive damages and that, instead, there is no basis for inferring a punitive damages remedy "[a]bsent clear congressional guidance" that such a remedy was intended. *Foust*, 442 U.S. at 52. That approach is consistent with this Court's decisions in *Foust* and *Fact Concerts*. In addition, it takes into account that *Franklin* is both by its terms, and by the decisions on which it was built, limited to the availability of compensatory damages, and does not justify the award of additional damages to serve broader societal goals of punishment and deterrence. Furthermore, holding that punitive damages are outside the *Franklin* presumption recognizes that the decision whether punitive damages are appropriate in a particular context is a policy matter best suited for legislative resolution.

It is of course the traditional role of the legislative branch to devise the punishment for violation of our criminal laws. In doing so, the legislature must weigh various policy considerations, including the competing goals of deterrence and fairness. Similar considerations enter the mix in deciding whether to allow recovery of the "quasi-criminal" penalty of punitive damages. *Cooper Indus.*, 532 U.S. at 432. Furthermore, the "long-enduring debate" over the "propriety" of punitive damages awards—reflected in the debate running throughout this Court's recent decisions involving the constitutional limits on punitive damages awards[6]—underscores the difficult policy judgments that must be made in determining whether to allow the recovery of punitive damages and, if so, in what fashion. Indeed, legislative penalties are one of the guideposts that police the constitutional limits on excessive punitive damages awards. See *Gore*, 517 U.S. at 583-584.

In recent decisions, this Court has admonished that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to implying the existence of private causes of action, or considering requests to expand the contours of previously implied private rights of action. *Alexander*, 532 U.S. at 287; see *Malesko*, 122 S. Ct. at 519-520 & n.3; *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 180 (1994). In *Sandoval*, the Court specifically refused a request to "revert * * * to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted," which—the Court stated—"is captured by the Court's statement in *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964), that 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional

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[6] See, *e.g.*, *BMW* v. *Gore*, 517 U.S. 559 (1996); *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993); *Haslip*, *supra*; *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

purpose' expressed by a statute." 532 U.S. at 287. That restraint respects the traditional separation of powers under our Constitution. See *id.* at 286-287.

Although *Sandoval* and *Malesko* involved efforts to extend previously inferred private rights of action to new claims or defendants, the same judicial restraint is called for with respect to efforts to expand the range of available remedies. To be sure, with respect to the latter the Court has "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser*, 524 U.S. at 284. But restraint is nevertheless called for in exercising such discretion with respect to punitive damages. See *Franklin*, 503 U.S. at 77 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., concurring) ("[W]hen rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well."). In this case, the Court should hold that when Congress does not express a punitives damages remedy, the courts should not infer such a remedy unless there is clear congressional guidance to the contrary.

II. THERE IS NO BASIS FOR JUDICIAL INFERENCE OF A PUNITIVE DAMAGES REMEDY UNDER SECTION 504 OR SECTION 202

There is no clear guidance that Congress intended to allow punitive damages in an action under Section 504 and Section 202. To the contrary, all indications point in the opposite direction.

A. Congress Has In No Way Sanctioned A Punitive Damages Remedy Under Section 504 Or Section 202

The legislative record with respect to Section 504 and Section 202 strongly indicates that Congress did *not* intend a punitive damages remedy to be available under either of

those provisions.[7] To begin with, as discussed above, Section 505(a)(2) of the Rehabilitation Act, which was added in 1978, expressly adopts for Section 504 the "remedies, procedures, and rights set forth in [Title VI]." 29 U.S.C. 794a(a)(2). Title VI, of course, has no express private cause of action at all, so it necessarily does not expressly provide for the availability of punitive damages. Moreover, in 1978, at the time of Section 505(a)(2)'s explicit cross-reference to Title VI, there were no judicial decisions recognizing a punitive damages remedy in a private action under Title VI. In fact, the only reported decision at that time that involved a request for punitive damages in a Title VI action refused to permit damages of *any* kind, including punitives. See *Rendon* v. *Utah State Dep't of Employment Sec. Job Serv.*, 454 F. Supp. 534, 537 n.3 (D. Utah 1978).[8]

Furthermore, Congress amended the Rehabilitation Act in 1986, 1987, and 1991, and it adopted Section 202 in 1990. During that period, the overwhelming if not universal position of the lower courts was that punitive damages were not available under Section 504 or Title VI. See Pet. App. 13a-14a ("When Congress enacted the Rehabilitation Act and at the time of the subsequent amendments, courts generally agreed Title VI and section 504 did not afford monetary damages, and were in near unanimity that they did not per-

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[7] The focus of the discussion here is on the legislative record with respect to Section 504. As discussed above, however, Section 202 expressly adopts the remedies available under Section 504. See p. 4, *supra*.

[8] Whatever reluctance there might be to consult the state of the case law at the time of a legislative enactment to determine if Congress ratified the view of the courts, that inquiry seems unavoidable in light of Section 505(a)(2)'s explicit cross-reference to remedies under Title VI. As discussed, Congress has not expressly adopted any private remedies with respect to Title VI. Therefore, Congress's cross-reference must be understood by reference to remedies that had been inferred by the courts at the time of its enactment.

mit punitive damages."); see *id.* at 14a n.9 (collecting cases); *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 790 (6th Cir. 1996) (collecting cases). In light of Congress's reference to the remedies available under Title VI (directly in Section 505(a)(2) of the Rehabilitation Act and indirectly in Section 202), Congress must be presumed to have been aware of this case law, and therefore could not have *clearly* intended to make punitive damages available by remaining silent in the face of that case law.[9]

Congress's action in 1991 is perhaps even more telling. As discussed above, in 1991 Congress amended the Rehabilitation Act and the ADA to establish a *limited* punitive damages remedy in intentional employment discrimination actions. See 42 U.S.C. 1981a(a)(2) and (b). The congressional findings enacted as part of the 1991 Act are significant in two key respects. First, they make clear that the Act provides "*additional* remedies." 42 U.S.C. 1981 note (§ 2(1), 105 Stat. 1071) (emphasis added). See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1951 (2001); Pet. App. 15a. Second, the findings state that the remedies were added "to

[9] The 1986 amendments to the Rehabilitation Act included a provision that stated that in a suit against a State, "remedies (including remedies both at law and in equity) are available for * * * a violation [of Section 504 or other provision] to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. 2000d-7(a)(2). As this Court recognized in *Franklin*, that "saving clause says nothing about the nature of those other available remedies." 503 U.S. at 73. And there is no reason to read Congress's glancing reference to "available" remedies as an intent to adopt a punitive damages remedy that was not available under the existing judicial decisions. In *Franklin*, the Court reasoned that the 1986 amendments supported the inference of a compensatory damages remedy under the "traditional rule" on which *Franklin* is grounded. *Ibid.* But as discussed above, that "rule" does not extend to the availability of punitive damages and, therefore, Congress's failure to be more explicit about the particular types of remedies that it had in mind leads to the conclusion that Congress did *not* have in mind punitive damages.

deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. 1981 note (§ 2(1), 105 Stat. 1071) (emphasis added). The 1991 Act thus underscores both that Congress knows how to establish an "additional" punitive damages remedy when it wants to, and that Congress is cognizant of when such an additional remedy is needed to deter wrongful misconduct, a central objective of punitive damages. See *Cooper Indus.*, 532 U.S. at 432.

Moreover, the 1991 Act renders the decision below particularly anomalous. A plaintiff who is subjected to intentional employment discrimination on the basis of his disability is expressly entitled to punitive damages under the 1991 Act, but those damages are expressly capped at $300,000 or less, and are not available against government actors. 42 U.S.C. 1981a(b). So if respondent had sued petitioners under the provisions that expressly provide for punitive damages, he could not recover *any* punitive damages because of petitioners' governmental status. In this case, however, by suing under provisions that do not expressly provide for punitive damages, respondent obtained a $1.2 million punitive damages award (four times the statutory limit with respect to private sector employers) against the municipal defendants. This Court has repeatedly refused to impute to Congress an intent to create *inferred* rights that are broader than the *express* rights in the surrounding statutory scheme, and there is no reason to impute to Congress such an intent when it comes to the availability of punitive damages.[10]

[10] See, *e.g.*, *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999) ("The Government's enforcement power may only be exercised against the funding recipient, and we have not extended damages liability under Title IX to parties outside the scope of this power.") (citation omitted); *NCAA* v. *Smith*, 525 U.S. 459, 467 n.5 (1999) (same); *Gebser*, 524 U.S. at 289 ("It would be unsound * * * for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's

B. Inferring A Punitive Damages Remedy Would Frustrate Section 504's Programmatic Objectives

This Court has stated that Title VI in effect "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286. As explained below, the "contractual nature" of Title VI—from which both Section 504 (by way of Section 505(a)(2)) and Section 202 (by way of Section 504) derive their remedies—"has implications for [the Court's] construction of the scope of available remedies" in an implied private right of action to enforce Section 504 or Section 202, *Gebser*, 524 U.S. at 287, and, more to the point, also cuts against judicial inference of a punitive damages remedy. See *ibid.* ("When Congress attaches conditions to the award of federal funds under its spending power, * * * we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition.").

First, the need for an inferred punitive damages remedy to deter wrongful conduct is off-set by the availability of other sanctions that are expressly created by the statutory and regulatory scheme under Title VI, Section 504, and Section 202. As discussed above, Title VI directs agencies that distribute funding to develop requirements to effectuate the statute's non-discrimination principle, and authorizes agencies to enforce those requirements by terminating or refusing to grant financial assistance, or by "any other means authorized by law." 42 U.S.C. 2000d-1(2); see 28

knowledge or its corrective actions upon receiving notice."); see also *Central Bank*, 511 U.S. at 180 ("[I]t would be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.' ").

C.F.R. 42.106-42.110. The Department of Justice has incorporated the same penalty provisions into its Section 504 regulations, which permit the funding agency to discontinue federal funding. See 28 C.F.R. 42.530. As this Court has recognized, the termination of federal financial assistance is itself a "severe" remedy, *Cannon* v. *University of Chicago*, 441 U.S. 677, 704-705 (1979), and thus a powerful weapon in deterring unlawful discrimination.[11]

The Section 504 and Section 202 regulations establish a less potent but nonetheless effective deterrent short of the termination of federal financial assistance. The regulations permit the filing of administrative complaints with the Department of Justice or funding agency that may be investigated by the federal government and, in appropriate cases, referred to the Attorney General for the filing of an action by the United States. See pp. 3-4, *supra*. The Department of Justice has entered into numerous consent decrees and settlement agreements in response to the filing of such administrative complaints, which typically require public entities to take prospective corrective action in response to alleged discriminatory practices, and at times also provide for a damages payment. Unlike punitive damages awards, which are rendered by juries in individual cases, the regulatory scheme gives the executive branch discretion to choose the remedies best suited to ensure compliance with conditions on funding.[12]

[11] Of course, the availability of compensatory damages in an implied private cause of action under Section 504 or Section 202 is also a strong deterrent to unlawful discrimination. See *Imbler* v. *Pachtman*, 424 U.S. 409, 442 (1976) ("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct.") (White, J., joined by Brennan and Marshall, JJ., concurring in judgment).

[12] The nearly unfettered discretion that a jury has to arrive at a punitive damages award is in stark contrast to the careful procedures that must be followed before an administrative penalty such as a termination in

Second, the availability of punitive damages awards under Section 504 could frustrate the achievement of programmatic goals, and perhaps even deter entities from accepting federal financial assistance that would trigger Section 504. As this Court has recognized, punitive damages awards are both "unpredictable and, at times, substantial." *Fact Concerts*, 453 U.S. at 270-271; see *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) ("Recent years * * * have witnessed an explosion in the frequency and size of punitive damages awards."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."). Moreover, when punitive damages are awarded against a government, they "are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Fact Concerts*, 453 U.S. at 267; see *id.* at 271 (punitive damages awards may place a "strain on local treasuries and therefore on services available to the public at large").

The imposition of large punitive damages awards—on top of compensatory damages—may require recipients of federal funding to divert scarce resources from achieving programmatic objectives. It is a far from obvious inference that the same Congress that appropriates federal funds to provide vocational or similar activities would want to expose funding recipients to unbounded punitive damages awards that could divert funds from achieving federal objectives. The imposition of such awards might also affect a recipient's willingness —or financial wherewithal—to enter into a compliance agreement with the federal government to take prospective corrective action that might benefit a broad class of victims. Furthermore, the possibility of such awards may lead private or public entities to forego federal funding altogether, and thus undermine Congress's efforts to fund vocational services and eliminate discrimination through Section 504. The substantial risk that inferring a punitive damages remedy would upset programmatic objectives of assisting the disabled and combating unlawful discrimination is all the more reason to demand a clear directive from Congress before crossing that bridge.

Third, this Court has stated that "an offer of federal funding on a promise by the recipient not to discriminate * * * amounts essentially to a contract between the Government and the recipient of funds." *Gebser*, 524 U.S. at 286. The longstanding common law rule, however, is that punitive damages are *not* available in breach of contract actions. See 5 A. Corbin, *Corbin on Contracts* § 1077, at 438 (1964); Restatement (Second) of Torts § 908 (1979); see also *Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting) ("For 200 years, recovery for breach of contract has been limited to compensatory damages."). And this Court of course "take[s] it as given that Congress has legislated with an expectation that [common law] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (quotation omitted).

In the Spending Clause context, moreover, this Court has emphasized the importance in "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'" *Gebser*, 524 U.S. at 287; see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28-29 (1981). Especially in light of the inherently unpredictable nature of

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funding may be imposed on an entity that is bound by Section 504's nondiscrimination mandate. See 42 U.S.C. 2000d-1 (prior to administrative action for non-compliance with Title VI the funding agency, *inter alia*, "shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action").

punitive damages, the notice principle also counsels against inferring a punitive damages remedy under Section 504.

C. Inferring A Punitive Damages Remedy Would Be Especially Inappropriate With Respect To Government Entities

The conclusion that Congress did not intend a punitive damages remedy under Section 504 or Section 202 is even stronger in the case of government actors, such as petitioners here. First, as noted above, when Congress established a limited punitive damages remedy in 1991, it expressly provided that such remedy did not extend to "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1). Second, longstanding common law—of which Congress is presumed to be aware—establishes a "presumption *against* imposition of punitive damages on governmental entities." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785 (2000) (emphasis added); see *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.13 (1985); *Fact Concerts*, 453 U.S. at 259-263. And third, as discussed above, exposing governments to punitive damages raises particularly sensitive policy concerns—including whether such "retribution should be visited upon the shoulders of blameless or unknowing taxpayers," *id.* at 267; see *Vermont Agency*, 529 U.S. at 785 n.15—that only heighten the need for a legislative judgment as to the availability of such damages.

In his brief in opposition to certiorari (at 6), respondent argued that "[p]etitioners have waived their right to argue that punitive damages should not be awarded because the Board of Police Commissioners is a municipality." But even if the Court concludes that that argument is not properly before it, there still would be no basis to impute to Congress an intent to allow the recovery of punitive damages under Section 504 or Section 202. The Court's traditional reluctance to infer a punitive damages remedy against a government actor is an additional reason to reverse the judgment below, but it is by no means a necessary reason here.

Moreover, the court of appeals' decision erroneously implies the availability of a punitive damages remedy in *any* action under Section 504 and Section 202, regardless of whether the defendant is a government actor. And its erroneous application of *Franklin* effectively creates a broadly applicable presumption in favor of the availability of punitive damages. Accordingly, in deciding this case, the Court should provide guidance on the application of *Franklin* with respect to the judicial implication of a punitive damages remedy, and make clear that the *Franklin* holds no sway with respect to the availability of that extraordinary remedy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2002

(5)

No. 01-682

Supreme Court, U.S.
FILED
FEB 26 2002
CLERK

In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA MUNICIPALITIES, STATE MUNICIPALITIES, AND THE FLORIDA LEAGUE OF CITIES IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Pursuant to Rule 37 of the Supreme Court Rules, the California municipalities of Sacramento, Alameda, Avalon, Barstow, Carlsbad, Chula Vista, Claremont, Corte Madera, Cotati, Daly City, Del Rey Oaks, Dixon, Emeryville, Fresno, Hollister, Huntington Beach, Indian Wells, Inglewood, Irvine, Laguna Beach, Lakewood, Lathrop, Long Beach, Los Angeles, Madera, Marina, Monrovia, Monterey, Moreno Valley, Placerville, Redlands, Redondo Beach, Rialto, Riverside, Roseville, Ross, San Anselmo, San Bernardino, San Diego, San Francisco, San Joaquin, San Jose, San Luis Obispo, San Pablo, Santa Clara, Santa Paula, Santa Rosa, Sunnyvale and Tracy; together with the cities of Baltimore, Maryland; Boise, Idaho; Cleveland, Ohio; Denver, Colorado; Hartford, Connecticut; Houston, Texas; Indianapolis, Indiana; Las Vegas, Nevada; Montgomery, Alabama; Nashville, Tennessee; New York, New York; Philadelphia, Pennsylvania; Phoenix, Arizona; Pittsburgh, Pennsylvania; Portland, Oregon; St. Paul, Minnesota; St. Petersburg, Florida; Tucson, Arizona; and Virginia Beach, Virginia; and with the Florida League of Cities, respectfully submit this brief as *amici curiae* in support of the brief of Petitioners Kay Barnes, in her official capacity as Member of the Board of Police Commissioners of Kansas City, Missouri, *et al.*

Amici have a compelling interest in the legal question presented by the appeal herein. Any punitive damages

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

award imposed against a municipality would have to be paid with limited municipal financial resources. Such payment would require the municipality to divert funds, in an amount limited only by the unpredictable restraint or generosity of a jury, from municipal programs, services and activities, all at the expense and to the detriment of innocent municipal taxpayers and residents.

I.
SUMMARY OF ARGUMENT

This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), has confirmed the following well-settled rule, followed by a majority of state and federal courts and expressly enacted by several states: in general, punitive damages awards cannot be imposed against municipalities. Erroneously relying on the holding in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Eighth Circuit below has diverged from precedent established by this Court and by lower federal courts, including the Eighth Circuit itself, which prohibits the award of punitive damages against a municipality.

The remedy of punitive or exemplary damages is additional to compensation and other relief. The historic use and the purpose of such a remedy is revealed in the name, that being to punish the wrongdoer and to make an example that will deter subsequent similar acts by the wrongdoer or others who might be inclined to engage in such misconduct. The common law proscribing punitive damages awards against municipalities has largely remained intact, with only limited statutory exceptions. Over the years, important public policy considerations

have restrained judicial creation of punitive damage remedies against municipalities. The lack of any expression of legislative intent to allow punitive damages awards against municipalities under either the Americans with Disabilities Act or the Rehabilitation Act of 1973 indicates that Congress did not intend to deviate from the well-founded public policy prohibiting such awards.

Punitive damages is an inappropriate remedy when the tortfeasor is a municipality rather than an individual wrongdoer. Such an award must necessarily be paid from the public funds of the municipality. The pain of a punitive damages award against a municipality is felt no more keenly by the malfeasant public official than by any other resident of the community, and a public official residing outside of the community exposed to punitive damages may not feel the pain of the punitive damages award at all. Given the length of time likely to elapse between an injury and the ultimate imposition of a punitive damages award, the official may, by that time, no longer retain his or her official position nor continue to reside in the community.

As the official is not effectively punished by the award, there is no sound basis to conclude that the punitive damages award would effectively deter the official's repetition of the offending act. Any deterrent effect on the municipality itself is extremely attenuated and only incremental, as the municipality is already punished by payment of compensatory damages and other costs incurred due to the acts of the errant official. Because a punitive damages award against a municipality cannot fulfill the purposes of punitive damages to punish and deter, its selection as a remedy would be fundamentally unsound.

An award of compensatory damages for the conduct would provide sufficient incentive for the municipality to take appropriate punitive action against the offending official. Moreover, the municipality has at hand more effective means to punish the offending public official and deter similar acts by the official or others, by its authority to discipline or to remove the official from office. The democratic election process and the close scrutiny commonly applied by the press to public officials and their actions also provide meaningful checks on, and deterrents against, officials' misconduct. In addition, an award against the individual municipal official would serve the punitive and deterrent purposes of a punitive damages award much more effectively than an award against the municipality.

A municipality required to pay a punitive damages award would be exposed to essentially unlimited liability, which could result in a financial burden of ruinous proportions for communities across the nation. The "deep pocket" perception with which a jury would be tempted to view the taxing authority of a municipality would surely lead to instances of unwarranted substantial awards requiring reduction or cessation of desirable, beneficial and necessary municipal services. It would be imprudent to rely on juries to strike the proper balance between the desire to impose punitive damages and a municipality's financial ability to pay such an award. One reason is that jurors, especially in federal courts, are likely to be drawn from outside the municipality and to have little motivation to give due consideration to the municipality's financial limitations.

A $1.2 million punitive damages award such as was rendered by the jury in this case, while substantial in any event, in the case of a smaller municipality could be catastrophic to every resident who relies on the municipality for basic public services. Fearing such adverse consequences, municipalities would be unduly pressured to settle and pay questionable claims. For their financial protection, municipalities would have to consider prospective reduction or curtailment of public programs and services, possibly choosing the safer course of simply not offering some programs or services at all, rather than risking punitive damages awards for any alleged misconduct in their implementation.

The unavailability of liability insurance to cover punitive damages awards, due to proper public policy concerns expressed by several courts, would expose the entire array of municipal services to forfeiture under an obligation to pay punitive damages. Neither would establishment of a municipal reserve fund to pay prospective punitive damages offer a realistic solution. A reserve could be established only by anticipatory defunding of programs and services, and its existence would then simply raise the bar for determination of an award amount sufficient to inflict the pain that is necessary to effective punishment. Thus, establishment of such a reserve would engender a vicious cycle of escalating awards, higher reserves and greater inroads on the municipality's ability to offer programs, services and activities.

Finally, both the Americans with Disabilities Act and the Rehabilitation Act of 1973 provide adequate remedies

and sufficient deterrents, including injunctive relief, compensatory damages and attorney fees. Under these enactments, plaintiffs would not be left without a remedy by the disallowance of punitive damages awards against municipalities. The residents and taxpayers of the municipality are already punished by having to pay compensatory damages and attorney fees for the acts of their public officials and the plaintiff is fully compensated for the injuries suffered. A punitive damages award would unnecessarily harm an adequately punished municipality and would constitute a windfall to the amply compensated plaintiff and his attorney.

II.

ARGUMENT

In *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. 2001), the Eighth Circuit Court of Appeals held that punitive damages may be awarded against a municipality in cases brought under Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12132 *et seq.*; "ADA") and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a); "Rehabilitation Act"). In doing so, the Eighth Circuit disregarded decisions of this Court, as well as prior decisions of its own circuit, which upheld the longstanding rule of law that punitive damages are not recoverable against a municipality. The Eighth Circuit failed to follow "the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine [of municipal immunity from punitive damages].' " *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263, quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Rather, the court, relying upon *Franklin v. Gwinnett County Public Schools*,

503 U.S. 60 (1992), implied the existence of punitive damages as a remedy under Title II of the ADA and Section 504 of the Rehabilitation Act without consideration of applicable precedent on the subject of municipalities' immunity from punitive damages awards. The court's discussion in the case below did not include the peculiar concerns which are implicated in permitting punitive damages to be awarded against a municipality, including the adverse effect on finite municipal budgets and concomitant reduction in municipal services and programs. It also failed to consider the impact of such an award on innocent municipal residents and taxpayers, and the fact that the compensatory objectives of the ADA and the Rehabilitation Act have already been achieved.

1. *CITY OF NEWPORT V. FACT CONCERTS, INC.* STATES THE PROPER RULE OF LAW REGARDING THE RECOVERABILITY OF PUNITIVE DAMAGES AGAINST A MUNICIPALITY, WHICH HAS BEEN FOLLOWED BY A MAJORITY OF COURTS AND IS CONSISTENT WITH VARIOUS STATE STATUTES

A. *Franklin v. Gwinnett County Public Schools* Is Not Controlling

The Eighth Circuit's reliance on *Franklin v. Gwinnett County Public Schools* represents a significant departure from well established authority for the proposition that punitive damages are not recoverable against a municipality in general, nor under Title II of the ADA and Section 504 of the Rehabilitation Act, in particular. *Amici* endorse the petitioners' arguments regarding the lower court's application of *Franklin*, but will not attempt to

duplicate those arguments here. However, *amici* acknowledge that this Court held in *Franklin* that consideration of remedies for an implied right of action in a Title IX case requires a two-part inquiry: first, whether Congress intended to limit the available remedies; and second, which remedies are appropriate. That inquiry led the Court to conclude that compensatory damages offered the appropriate remedy to right the wrong done to Franklin, the other available Title IX remedies of back pay and injunctive relief being ineffective under the circumstances of the case.

Nothing in *Franklin* suggested that Congressional limitation of available remedies could be found only in an express legislative proscription and that all other evidence of legislative intent should be disregarded. Nor did the Court hold that the spectrum of all available remedies could be narrowed, to a selection of those that are appropriate, only by analysis of the specific facts of a case, as the Eighth Circuit has suggested below. Moreover, having resorted to the common law to imply a cause of action and an appropriate remedy for a violation of Title IX (*Franklin*, 503 U.S. at 66-67), the Court undoubtedly did not intend that lower courts should reject immunity doctrines of the same common law when called upon to consider the inapplicability of punitive damages awards to municipalities under the related legislative schemes of the ADA and the Rehabilitation Act.

B. *City of Newport v. Fact Concerts, Inc.* Is The Leading Case On The Question Before The Court, And Bars Punitive Damages Awards Against Municipalities

This Court's decision in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), clearly states the rule of law applicable in this case. In *City of Newport*, the Court examined what was then a "novel" question (*id.* at 257), whether punitive damages could be awarded against municipalities in actions under 42 U.S.C. § 1983. The Court decisively held that a careful inquiry into considerations of history and public policy compelled a determination of municipal immunity to punitive damages under § 1983. The reasoning and the holding of *City of Newport* remain valid today, undisturbed by the Eighth Circuit below, and apply with equal force to the case at hand.

Despite the current split of authority among several of the circuits,[2] the predominant traditional and current view among federal and state courts has been, and remains, that punitive or exemplary damages are not recoverable against public entities including municipalities, absent express statutory authorization.[3] Annot.,

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[2] See, *e.g.*, *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. 2001); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996); *Pandazides v. Virginia Board of Education*, 13 F.3d 823 (4th Cir. 1994); and *Doe v. County of Centre*, 242 F.3d 437 (3rd Cir. 2001).

[3] See, *e.g.*, *Eddy v. Miami*, 715 F. Supp. 1553 (1989, S.D. Fla.); *Carpenter v. Dizio*, 506 F. Supp. 1117 (1981 E.D. Pa.); *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 (1858); *Choate v. County of Orange*, 86 Cal. App. 4th 312 (2000); *Columbus v. Myszka*, 246 Ga. 571 (1980); *Wilson v. Eagan*, 297 N.W.2d 146

1 A.L.R. 4th 448 (2001). States such as California, Minnesota, Ohio, Illinois, Alabama, Colorado, Nevada and Pennsylvania, and Puerto Rico, have provided by statute that public entities, including municipalities, are not liable to pay punitive damages awards.[4] Recognizing the challenge recently encountered by the courts in construing *Franklin* and *City of Newport*, one court observed:

> [I]nsofar as the rules of *Franklin* and *City of Newport* conflict, the reasonable way to reconcile them is to give effect to the narrower rule in the latter. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 119 L.Ed. 2d 157, 112 S. Ct. 2031 (1992) (in statutory construction, "the specific governs the general"). After all, the issue here is not the general availability of damage remedies, but rather the specific availability of punitive damages against municipalities. In these circumstances, *City of Newport* tells us to assume that Congress intended to retain common law immunity, unless there is a clear expression of congressional intent to the contrary.

Doe v. County of Centre, 242 F.3d 437, 455 (3rd Cir. 2001).

Of the plethora of cases barring recovery of punitive damages from a municipality, one of the most significant to this appeal is *Kline v. City of Kansas City*, 175 F.3d 660

(1980, Minn.); *Sharapata v. Islip*, 82 App. Div. 2d 350, 441 N.Y.S.2d 275, *affd.*, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1981, 2d Dept.); *Clements v. Airport Auth.*, 69 F.3d 321 (9th Cir. 1995); and *Cole v. Houston*, 442 S.W.2d 445 (1969, Tex. Civ. App. 14th Dist.).

[4] See, *e.g.*, Cal. Govt. Code § 818; Minn. Stat. § 466.04; ORC Ann. 2744.05; 745 ILCS 10/2-102; Code of Ala. § 6-11-26; C.R.S. 24-10-114; Nev. Rev. Stat. § 41.035; 42 Pa.C.S. § 8541, *et seq.*; and 32 L.P.R.A. §§ 3083 and 4705.

(8th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000). The plaintiffs in *Kline* sued defendant Kansas City under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010-213.139 (MHRA), for alleged sexual harassment in the form of intentional discrimination and hostile work environment. The U.S. District Court for the Western District of Missouri had held that punitive damages were not recoverable against the city. Then, just two years prior to its decision in the case below, the Eighth Circuit affirmed, holding that punitive damages were not recoverable against a city in Missouri unless specifically authorized by statute. In its opinion, the Eighth Circuit did not offer any rationale based on the Civil Rights Act, but did expressly conclude that punitive damages were not recoverable against a municipality under the MHRA. The Eighth Circuit reasoned that

> Because the burden of a punitive damages award against a municipality ultimately falls on the taxpayers, and thus will fail to deter future harmful activity by the municipality itself, punitive damages are not usually recoverable against a municipality in Missouri. [Citations omitted.] A municipality in Missouri is subject to punitive damages only if a statute specifically provides that it is.

Kline, 175 F.3d at 669-670, *cert. denied*, 528 U.S. 1155 (2000). In the case below, the Eighth Circuit failed to divulge any reason in support of its determination to abandon the logic articulated in *Kline*.

C. Municipalities' Immunity From Punitive Damages Awards Derives From Fundamental Common Law Principles And Is Undisturbed By Any Applicable Expression Of Legislative Intent

The *Newport* Court delved into the historical details evidencing Congressional intent in enacting § 1983, declaring that:

> The tort liability created by § 1983 cannot be understood in a historical vacuum. . . . Congress . . . expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

City of Newport, 453 U.S. at 258.

The Court understood that the immunities afforded state officials at common law included the historical immunity of municipalities from punitive damages:

> By the time Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question. It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity. But this understanding did not extend to the award of punitive or exemplary damages. Indeed, the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation. [Citations omitted.] Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions.

Id. at 259-260.

The Court also observed, "Given that municipal immunity from punitive damages was well established at common law by 1871, we proceed on the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Id.* at 263, citing *Pierson v. Ray*, 386 U.S. 547, at 555 (1967).

The *City of Newport* rationale is no less applicable to the facts at hand, and to claims under Section 504 of the Rehabilitation Act and Title II of the ADA. The Third Circuit Court of Appeals explained this in *Doe v. County of Centre*, 242 F.3d 437 (3rd Cir. 2001). Although finding that the County defendants had unlawfully discriminated against the plaintiffs on the basis of AIDS and HIV, the court held that the principles enunciated in *City of Newport* barred punitive damages against municipalities under Section 504 of the Rehabilitation Act and Title II of the ADA for the same reasons as under 42 U.S.C. § 1983. The court cited the identical public policy considerations and a similar lack of support in the common law or legislative history of the Rehabilitation Act or the ADA for punitive damages awards against municipalities. In

applying the *City of Newport* prohibition of such punitive damages awards, the Court also noted that both "Title II of the ADA and Section 504 of the Rehabilitation Act incorporate by reference the enforcement scheme found in Title VI of the Civil Rights Act of 1964." *Doe v. County of Centre*, 242 F.3d at 457.

The logical foundation of municipal immunity to punitive damages awards shares its basic principles with the established view of punitive damages in agency relationships. Historically, the principal did not bear responsibility in punitive damages for the tortious acts of its agent unless the principal had approved or ratified the malicious intent of the agent:

> The rule is well established that the principal is liable for all actual damage resulting from the malfeasances, negligences or torts of his servant or agent in the course of his employment, subject, however, to the limitation that he is not liable for the torts or negligence of his agent in any matter beyond the scope of his agency unless he expressly authorized them or has subsequently adopted them. "Hence it is," to use the language of Mr. Justice Story, "that the principal is never liable for the unauthorized or willful or the malicious act or trespass of his agent."

Turner v. North B. & M. R. Co., 34 Cal. 594 (1868), quoting Story's Agency, Sec. 456. See also *Wright v. Wilcox*, 19 Wend. 343 (1838); and *Hagan v. Providence & W.R.R.*, 3 R.I. 88 (1854). A police officer is a particular sort of agent of a municipality. The municipality's liability for punitive damages on account of the acts of its officials should be no greater than the liability of any principal for the acts

of its agent, and public policy considerations should further limit the municipality's liability.

D. The Rule Prohibiting Punitive Damages Awards Against Municipalities Is Bolstered By Important Public Policy Considerations, Including The Devastating Impact That Such Awards Would Wreak On Municipalities And Their Taxpayers and Residents

Analysis of public policy considerations confirmed the *City of Newport* Court's conclusion that punitive damages were not allowable against municipalities in § 1983 actions. The Court's own analysis followed the historic rationale that such awards were "contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers." *City of Newport*, 453 U.S. at 263. This view is consistent with the fundamental concept that punitive damages are intended "to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 266-267, citing Restatement (Second) of Torts § 908 (1979); W. Prosser, Law of Torts 9-10 (4th ed. 1971).

A punitive damages award against a municipality fails to place the intended punishment squarely on the tortfeasor. Instead, the burden is borne by the taxpayers who must pay the award and on the citizens who must forego services made unaffordable by the diversion of taxes to pay the award.

> [Punitive] damages are assessed over and above the amount necessary to compensate the injured party. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

City of Newport, 453 U.S. at 267.

Though declining to disturb settled authority prohibiting punitive damages awards against municipalities, the *City of Newport* Court acknowledged that punitive damages awards may be appropriate for civil rights violations under certain circumstances, against non-municipal defendants. *Id.* at 267-268, citing *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (1978). The *Carey* Court had limited its recognition of the possible propriety of punitive damages awards to enforcement against individuals and other private entities, citing *Silver v. Cormier*, 529 F.2d 161, 163-164 (10th Cir. 1976); *Stengel v. Belcher*, 522 F.2d 438, 444 n. 4 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976); *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974); *Caperci v. Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573, 576 (5th Cir. 1967); and *Basista v. Weir*, 340 F.2d 74, 84-88 (3rd Cir. 1965). *Carey*, 435 U.S. at 260. The Court's denial of punitive damages against the City of Newport conformed to the general rule that the primary purposes of § 1983 are compensation (including compensation by municipalities) and deterrence, rather than punishment. *City of Newport*, 453 U.S. at 268.

Turning next to the unfitness of punitive damages awards against municipalities to deter wrongdoing, the Court discerned that "the deterrence rationale of § 1983 does not justify making punitive damages available against municipalities." *Id.* at 268. The threat of punitive damages awards based on the perceived wealth of the municipality would be unlikely to deter ill-intentioned officials from wrongdoing. Other consequences, including the compensatory damages available against a municipality, would provide adequate motivation for the municipality to take corrective action, including the discipline or discharge of an offending official. The punitive damages remedy has been determined to be a more effective deterrent when imposed on the offending official, based on his personal financial resources, than the threat of damages against a government employer. *Id.* at 269-270, citing *Carlson v. Green*, 446 U.S. 14, 21 (1980).

The *City of Newport* Court understood the practical implications of creating a punitive damages remedy against municipalities. A municipality already responsible to compensate an injured plaintiff would be exposed to enormous financial risk by the additional imposition of punitive damages. Moreover, determination of the amount of a punitive damages award usually entails consideration of evidence of the tortfeasor's wealth, and

> [T]he unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain

> on local treasuries and therefore on services available to the public at large.

City of Newport, 453 U.S. at 270-271.

In addition, allowance of punitive damages against a municipality would be inconsistent with the widely held doctrine that the interests of public policy forbid insurance against punitive or exemplary damages. *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal. 4th 310 (1999); *City Products Corp. v. Globe Indemnity Co.*, 88 Cal. App. 3d 31 (1979); *Lira v. Shelter Ins. Co.*, 913 P.2d 514 (Colo. 1996). The prohibition against insurance for punitive damages is rooted not only in principles of agency, but also in concerns that such insurance would insulate the miscreant insured from the coercive effect of punitive damages, thereby promoting misconduct and reducing the usefulness of punitive damages as a remedy. Substituting "a municipality" for "an insurance company," the same rationale would apply to punitive damages awards against municipalities for the acts of errant public officials:

> The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company [a municipality], punitive damages would serve no useful purpose.

Northwestern National Casualty Company, 307 F.2d at 440.

The mere threat of punitive damage awards, regardless of any actual award, would itself inflict damage on municipalities by motivating municipalities to take protective measures to avoid imposition of punitive damages. "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages [citations omitted], the impact of these windfall recoveries is unpredictable and potentially substantial." *Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979). In *Foust*, the Court declined to allow the imposition of punitive damages under the Railway Labor Act for breach of a union's duty of fair representation. The Court spoke of the deleterious effect the threat of such an award would have on a union's broad discretion in handling grievances.

> Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members.

Id. at 51-52.

Analogous concerns exist with respect to municipal decision making, and particularly with respect to lawsuits under the ADA and Rehabilitation Act. Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)) prohibits discrimination against the disabled in a "program or

activity" receiving federal financial assistance. The primary substantive provision of Title II of the ADA (42 U.S.C. § 12132) repeats and somewhat broadens this prohibition, precluding discrimination against the disabled in a public entity's "services, programs, or activities," regardless of the funding source.

Without derogating the importance of the ADA and the Rehabilitation Act, those called upon to interpret and apply these acts are confronted by the fact that the legislation is less than clear in delineating the precise conduct to which a public entity is to conform itself. Neither the ADA nor its regulations define what constitutes a "service, program or activity." Though the Rehabilitation Act does define "program or activity" as "all of the operations of [the public entity]," this broad definition and the absence of a definition under the ADA has caused public entities uncertainty over the nature and extent of their obligations.[5] The threat of a large punitive award heightens concerns over the obligations and liability of a public entity under the ADA and Rehabilitation Act. As with unions in *Foust*, the threat of a future punitive award may compel a municipality's decision makers to undertake obligations far exceeding those required by the ADA or Rehabilitation Act. Notwithstanding the benefits that would accrue to a limited group of plaintiffs, such

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[5] The constitutional proscription against vague laws is "a basic principle of due process." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Within this doctrine is the idea that persons of ordinary intelligence should have a reasonable opportunity to know what is prohibited and that the standards should be clear enough to curb the danger of arbitrary or discriminatory enforcement. *Id.* at 109.

excess would come at the expense of other municipal programs and services. Indeed, a substantial punitive award (such as the $1.2 million in the instant case) or a settlement entered into in avoidance of the possibility of such an award, would provide a windfall to a single disabled individual. That expenditure would necessarily compel a reduction or termination of the very programs, services and activities that the municipality would otherwise provide to all of its residents, including its disabled residents, in accordance with the ADA and Rehabilitation Act.

The experience of the City of Sacramento in attempting to discern its obligations under the ADA and the Rehabilitation Act and the potential impact of a punitive damages remedy is illustrative, and undoubtedly not unusual. Sacramento has been subjected to claims that its sidewalks are "programs" under the ADA and Rehabilitation Act, imposing on the city an obligation to cure excessive cross slopes, obstructions in the path of travel (signs, poles, grates, etc.), narrow widths and broken concrete (in many instances caused by tree roots). As in many American cities, Sacramento's infrastructure dates from the mid-nineteenth century and includes a substantial length of sidewalks.

In recent years, Sacramento has dedicated substantial funds to construction of curb ramps and other improvements for sidewalk accessibility. Concerned about the breadth of ADA and Rehabilitation Act requirements and the possible judicial imposition of a financially debilitating obligation, the city has also tried, without much success, to negotiate a resolution. If the city must negotiate under the added threat of punitive damages, the city will

feel pressure to budget substantial financial resources for sidewalk improvements that ultimately may not be required by the ADA or the Rehabilitation Act. The threat of punitive damages would skew the city budget by reducing funds available for all other city programs and services, all to the detriment of its residents.

Obviously, the threat of punitive damages awards compounds the uncertainty that public entities are experiencing with respect to their obligations under Title II of the ADA and the Rehabilitation Act. Municipalities exist for the benefit of and have obligations to serve all of their residents, including the disabled. The threat of punitive damages awards, coupled with the broad scope of the ADA and the Rehabilitation Act, creates a high risk that a single, relatively small group will receive funding, activities, programs and services well in excess of what the law requires, at the expense of all of the municipality's residents, and undermining the municipality's ability to provide even basic municipal services.

III.

CONCLUSION

The Eighth Circuit's decision to let stand an award of punitive damages against a municipality under the ADA and the Rehabilitation Act utterly disregards the weight of precedent established by this Court, considerable existing legislative history and centuries of common law to the contrary. As the Court concluded in *City of Newport*,

> [C]onsiderations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.

City of Newport, 453 U.S. at 271. The *City of Newport* rationale is not limited to § 1983, in that it reflects both the common law and the body of modern jurisprudence. It applies equally to claims under the ADA and the Rehabilitation Act. The decision of the Eighth Circuit should be reversed.

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No. 01-682

Supreme Court, U.S.
FILED
FEB 27 2002
CLERK

In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE *AMICI CURIAE* STATES OF HAWAII, WASHINGTON D.C., FLORIDA, INDIANA, MAINE, MARYLAND, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, UTAH AND WYOMING IN SUPPORT OF PETITIONER, BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI

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INTEREST OF THE *AMICI CURIAE*

The Amici States are strongly interested in whether municipalities may be subjected to punitive damages awards in private actions brought under section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794 (West 1999) ("Section 504"), and section 202 of the Americans with Disabilities Act, 42 U.S.C.A. § 12132 (West 1995) ("Title II"). The States' own exposure to punitive damage awards under those provisions may be affected by the Court's decision in this case. Although this Court held in *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate the States' sovereign immunity from private actions brought to enforce Title I of the ADA, several courts of appeal have held that Title II of the ADA did validly abrogate that immunity. *See, e.g., Hason v. Medical Bd.*, No. 00-55784, 2002 WL 206414 (9th Cir. Feb. 12, 2002); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*) (Congress validly abrogated the States' sovereign immunity with respect to Title II claims that assert denials of due process). Moreover, several courts of appeal have ruled that States accepting federal funds waived their immunity to actions brought under Section 504 of the Rehabilitation Act. *See, e.g., Douglas v. Cal. Dept. of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001); *Jim C. v. Ark. Dept. of Educ.*, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied*, 121 S.Ct. 2591 (2001). Unless and until those lower court decisions are overturned, the States have a direct interest in ensuring that government's

traditional immunity from punitive damages is respected in this particular context.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit misapplied the general rule set forth in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), that " 'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.' " Pet. App. 9a (257 F.3d 738, 745-46) (quoting *Franklin*, 503 U.S. at 70-71). The court ignored well-established case precedent and congressional intent when it applied this broad remedies rule to the narrow question of whether punitive damages may be awarded against a municipality under Section 504 and Title II.

Units of government, both State and municipal, are afforded common law immunity from private, statutorily-created causes of action. There is, therefore, a strong presumption that punitive damages will not be awarded against them. *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 785 (2000); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981). This presumption exists partly because the intent of punitive damages is to punish the wrongdoer and deter him or her from similar future acts. Yet as applied to government units, there is no deterrence. A punitive damages award punishes the blameless taxpayer rather than the individual officer who committed the wrong and drains government treasuries.

Consequently, absent a clear statement by Congress abrogating States' and municipalities' common law immunity, the presumption is that those governments retain their immunity from punitive awards. The Eighth Circuit erred in failing to recognize this strong presumption.

Furthermore, Congress did not intend to abrogate government's traditional immunity from punitive damage awards when it enacted Section 504 and Title II. Neither Section 504's nor Title II's plain language mentions anything about punitive damages. Though Section 504's remedies provision provides that the "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance" under Section 504, 29 U.S.C.A. § 794a(a)(2) (West 1999), Congress did not specify any monetary remedies under Title VI. This Court subsequently implied a cause of action and remedies for intentional violations of Title VI. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 597 (1983). The ADA's remedies provision similarly relies on Title VI, and is silent as to punitive awards. 42 U.S.C.A. § 12133 (West 1995).

This silence is telling because it shows that Congress intentionally omitted punitive awards under those provisions. In 1991, Congress enacted the Civil Rights Act of 1991, which provided a limited recovery of punitive damages against private employers – but not against units of government – under Section 501 of the Rehabilitation Act and Title I of the ADA, 42 U.S.C. § 1981a (1994), but not under Section 504 or Title II. The specific provision for punitive damages in only Section 501 and Title I shows

that Congress intended to omit any reference to punitive damages under Section 504 and Title II. *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001). Additionally, by excluding units of government, Congress clearly intended to preclude state and municipal liability for punitive damages.

Equally significant is that when Congress enacted Section 504, the majority of courts had held that punitive damages were not available against *any* Section 504 defendant, let alone a unit of government. In order to rebut the presumption that Congress intended the *status quo* of no punitive damages to continue, there must be a specific statement by Congress to the contrary. *Newport*, 453 U.S. at 263. However, the only express provision by Congress for a sanction against a unit of government is an administrative sanction – the withdrawal of federal funding. This express provision does nothing to rebut the presumption that States and municipalities maintained their traditional common law immunity from punitive awards. In fact, it bolsters the position that Congress did not intend to abrogate that immunity.

Despite well-established case law, traditional presumptions afforded units of government, standard rules of statutory construction, and compelling public policy, the Eighth Circuit held that the general rule set forth in *Franklin* allowed a jury to award punitive damages against a municipality. This was error.

ARGUMENT

I. The Immunity From Punitive Damages That Governmental Entities Enjoyed At Common Law Applies to Statutorily-Created Causes Of Action Absent A Clear Congressional Intent To Abrogate That Immunity.

As this Court's decisions make clear, the immunity from punitive damages that units of government enjoyed at common law applies to statutorily-created causes of action unless Congress clearly abrogates that immunity. *See Vt. Agency of Natural Res.*, 529 U.S. at 784-85; *Newport*, 433 U.S. at 271. The Eighth Circuit overlooked this rule when it held that a local unit of government could be held liable for punitive damages under Section 504 and Title II. Neither of these provisions reflects a congressional intent to abandon the traditional governmental immunity from punitive damages. The Eighth Circuit's decision should therefore be reversed.

In *Newport*, the Court held that punitive damages were not available in actions brought against municipalities under 42 U.S.C. section 1983. 453 U.S. at 271. The Court reasoned that when Congress enacted Section 1983, it was presumably aware of common law defenses to tort claims and intended to preserve those defenses absent evidence to the contrary. *Id.* at 258. One such defense, the Court noted, was that municipalities were traditionally immune from punitive damage awards. *Id.* at 259-60. Finding no evidence in Section 1983's language, purpose, and legislative history that Congress intended to abolish that immunity, the Court in *Newport* concluded that municipalities enjoyed immunity from punitive damage awards in Section 1983 actions. *Id.* at 258-71.

In so ruling, the *Newport* Court stressed that both logic and weighty public policy considerations supported governmental immunity from punitive awards:

> Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. *A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the government entity itself.*

Id. at 267 (citations omitted) (emphasis added).[1] Awarding punitive damages against a government entity punishes "blameless or unknowing taxpayers" while providing a windfall to a fully compensated plaintiff. *Id.* at 267. "The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-71.

The foregoing considerations apply as equally to state governments as they do to municipalities. As with municipalities, punitive damage awards misallocate

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[1] *See also Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (government entities are incapable of forming malicious intent, and under RICO, damages amounting to punitive awards should not be imposed because it is the "body politic" that suffers); *Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264 (M.D. Ga. 1994) (similarly holding).

scarce resources from state programs that are likely underfunded to plaintiffs who have already received full compensation. Not surprisingly, then, this Court in *Vermont Agency of Natural Resources* relied upon the governmental immunity from punitive damages as a basis for concluding that States could not be held liable for punitive awards under the punitive False Claims Act ("FCA"). 529 U.S. at 784-85. The Court noted that "in *Newport* . . . we were concerned with imposing punitive damages on taxpayers under *any circumstances*. [Punitive damages], being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women[.]" *Id.* at 786 n.15 (internal quotations marks and citation omitted).

Nothing in *Franklin v. Gwinnett County Public Schools* suggests that this presumptive immunity from punitive damages does not apply when units of government are sued under statutes other than Section 1983 and the FCA. 503 U.S. 60 (1992). The *Franklin* Court was concerned with whether damages awards may, *in general*, be awarded under Title IX. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Consequently, the Court "made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie[.]" *Id.*

Franklin merely stands for the principle that, where Congress has not specified the remedies available for violations of particular statutory rights, the federal courts have inherent authority to fashion "appropriate relief" to redress those violations. 503 U.S. at 66-71. The "appropriate relief" principle derived from such cases as *Carey v. Piphus*, in which the Court recognized that "[t]he cardinal principle of damages in Anglo-American law is that of

compensation for the injury caused to plaintiff by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (emphasis in original) (internal quotation marks and citation omitted); *see also Franklin*, 503 U.S. at 69 (quoting *Carey*). As in *Franklin*, the Court therefore implied an award of compensatory, though not punitive, damages. Nothing in the Court's general application of the "all appropriate relief" principle in *Carey* or *Franklin* undercuts the *Newport* or *Vermont Agency of Natural Resources* Court's more specific holdings that punitive damages are not available in Section 1983 or FCA actions directed against local or state governments.

In sum, *Newport* and *Vermont Agency of Natural Resources* teach that punitive damage awards against state and local governments are presumptively foreclosed in actions to enforce statutory rights. Congress may reject this traditional limitation if it so chooses, but its intent to do so must clearly emerge from the statute's language, underlying purpose, and legislative history. As the next section shows, Congress has not manifested such an intent in either Section 504 or Title II.

II. Congress Did Not Intend To Abrogate Governmental Entities' Traditional Immunity From Punitive Damage Awards When It Enacted Section 504 and Title II.

Where the meaning of a statute is at issue, the search for congressional intent always begins with the statute's text and structure. *Alexander v. Sandoval*, 532 U.S. 275, 288 & n.7 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). "In ascertaining the plain meaning of the

statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). An examination of Section 504's and Title II's text and structure, construed in light of the Rehabilitation Act and the ADA as a whole, shows that Congress did not intend to expose units of government to punitive damage awards through these statutes.

1. Neither Section 504's nor Title II's plain language mentions anything about punitive damages. Instead, both statutes merely incorporate the remedies that Congress created for Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C.A. § 12133 (Title II); 29 U.S.C.A. § 794a(a)(2) (Section 504); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 & n.4 (1999); *see also Doe v. County of Centre*, 242 F.3d 437, 457 (3d Cir. 2001) ("On their face . . . neither Title II nor Section 504 indicate a congressional intent to override municipal immunity to punitive damages."). Title VI, moreover, is entirely silent on the matter of punitive damages. *See Doe*, 242 F.3d at 457.

In the face of this congressional silence, it would seem obvious that Section 504 and Title II lack the clarity this Court demands before concluding that Congress meant to strip governments of their traditional immunity from punitive damages. The members of the Congress that enacted Section 504 and Title II, no less than the members of the Congress that enacted Section 1983, were presumably "familiar with common-law principles, including defenses recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport*, 453 U.S. at 258; *see also Doe*, 242 F.3d at 456 ("When

Congress enacted Title II of the ADA and Section 504 of the Rehabilitation Act, it knew of the common law rule precluding punitive damages against municipalities."). Congress's failure to specifically expose units of government to punitive damages liability under these statutes can only be construed as an intentional decision to keep the traditional immunity intact.

2. The lower courts that have concluded otherwise have relied primarily on this Court's decision in *Franklin*. *See, e.g.*, Pet. App. 11a-16a; *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 829-32 (4th Cir. 1994) (state board of education could be sued for punitive damages under Section 504). Under *Franklin*, where Congress does not specify the remedies available to redress violations of federal statutory rights, the courts may fashion "appropriate" remedies, i.e., those remedies the courts had authority to award at common law in response to prohibited conduct. *See Franklin*, 503 U.S. at 66-68, 73-76. *Franklin* no doubt stands for the general proposition that, where Congress is silent on the matter of remedies in federal statutes, the courts are free to fashion appropriate relief in light of the traditional remedies available at common law. *Id.* at 66-68.

Franklin does not, however, suggest that governments' common law immunity from punitive damages is presumptively abrogated with respect to statutes like Section 504 and Title II. To the contrary, because a punitive award against a unit of government was not an "appropriate" remedy at common law, *see Newport*, 453 U.S. at 259-60, *Franklin* supports the view that punitive damages may *not* be awarded in cases against units of government brought under Section 504 and Title II. The holding in

Franklin simply re-affirmed a general remedies rule used since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), and does not supplant specific evidence of legislative intent rejecting punitive damages under Section 504 and Title II in general, and against government entities, in particular. *See Moreno v. Consol. Rail Corp.*, 99 F.3d 782, 791 (6th Cir. 1990) (*en banc*).

Indeed, if the court below and the Fourth Circuit in *Pandazides* have read *Franklin* correctly, then this Court's decision in *Newport* is effectively a dead letter. If the Eighth and Fourth Circuits are correct in their broad application of the general remedies rule used in *Franklin*, then *Franklin* compels the conclusion that governments may be held liable for punitive damages under Section 1983 and the FCA. This, of course, directly contradicts the holdings in *Newport* and *Vermont Agency of Natural Resources*.

Nothing in *Franklin* supports the extraordinary notion that the decision was intended as a *sub silentio* overruling of *Newport* or *Vermont Agency of Natural Resources*. Instead, the decisions may be construed together as providing that, regardless of whether punitive damages may be awarded against non-governmental defendants under statutes like Section 504 and Title II, the immunity from punitive damages that units of government enjoyed at common law persists with respect to statutory causes of action, absent a clear statement by Congress to the contrary. Because Section 504 and Title II lack that clear statement, the common law immunity should attach.

3. The structure of both the Rehabilitation Act and the ADA bolster the view that governments retain their immunity from punitive damages in actions brought pursuant to Section 504 and Title II. Through the Civil Rights Act of 1991, Congress specifically provided for the award of punitive damages for violations of Section 501 of the Rehabilitation Act and Title I of the ADA. The statute provides, in relevant part,

> A complaining party may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis added). Significantly, this statute does not apply to actions brought under Section 504 and Title II. *See* Pet. App. 15a. "The very structure of § 1981a suggests a congressional intent to authorize punitive awards *in only a subset of cases* involving intentional discrimination." *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 534 (1999) (emphasis added). In *Kolstad*, the Court recognized that Section 1981a was not an isolated amendment, but was carefully tailored for certain violations, *id.* at 530, 534, 537, that do not include violations of Section 504 or Title II. *See also Harrelson v. Elmore County*, 859 F. Supp. 1465, 1469 (M.D. Ala. 1994) ("Congress' express provision of punitive damages under Title I . . . counsels against a statutory construction that punitive damages are available under Title II by inference.").

Section 1981a(b)(1) goes a long way in reaffirming the view that governments enjoy immunity from punitive damages under Section 504 and Title II. This is so for two reasons. First, "[i]t is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan*, 121 S.Ct. at 2125 (brackets and quotation omitted); *see also Russello v. United States*, 464 U.S. 16, 22-23 (1983). By specifically authorizing punitive awards only under Section 501 of the Rehabilitation Act and Title I of the ADA, Congress presumably intended to foreclose such awards in actions brought under Section 504 and Title II. Indeed, prior to the enactment of the Civil Rights Act of 1991, the weight of authority had held that punitive awards were not available under either Title VI or Section 504. *See Moreno*, 99 F.3d at 789-90 ("punitive damages had never been awarded under § 504 and were widely believed to be unavailable.").[2] Given this prior judicial construction,

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[2] *See Eastman v. Va. Polytechnic Inst.*, 939 F.2d 204, 209 (4th Cir. 1991) (punitive damages not recoverable under Section 504); *Cortes v. Bd. of Governors*, 766 F. Supp. 623, 626 (N.D. Ill. 1991) (same); *Ams. Disabled for Accessible Pub. Transp. v. Skywest Airlines, Inc.*, 762 F. Supp. 320, 325 (D. Utah 1990) (same); *Glanz v. Vernick*, 750 F. Supp. 39, 45 (D. Mass. 1990) (same); *Martin v. Cardinal Glennon Mem. Hosp. for Children*, 599 F. Supp. 284 (E.D. Mo. 1984) (same); *Gelman v. Dep't of Educ.*, 544 F. Supp. 651, 654 (D. Colo. 1982) (same). *But see Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1138 (D.C. Iowa 1984) (punitive damages available under Section 504).

As the court in *Moreno* recognized, punitive damages likewise were not available under Title VI of the Civil Rights Act

Congress certainly would have included Section 504 and Title II within the ambit of the Civil Rights Act of 1991 had it wanted punitive damages awards to be made available under those provisions. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt ~~that in~~terpretation when it re-enacts a statute without change[.]").

Second, even as applied to Section 501 of the Rehabilitation Act and Title I of the ADA, Section 1981a(b)(1) expressly exempts units of government from punitive awards. This plainly shows that, where Congress contemplates the use of punitive damages to redress violations of civil rights statutes, it does not intend to authorize that remedy against units of government. And it is difficult to see why Congress would have intended to subject units of government to punitive awards for violating an anti-discrimination statute involving public services (Title II) but not a statute proscribing invidious employment discrimination (Title I). Therefore, Section 1981a(b)(1) provides strong evidence that Congress did not intend to expose governments to punitive damage awards in actions brought under Section 504 and Title II.

4. A further indication that Congress did not intend for punitive damages to be awarded against units of government under Section 504 and Title II is that Congress has already provided for an express, administrative sanction. This, coupled with the availability of other

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of 1964, on which Section 504 remedies are based. *See Moreno*, 99 F.3d at 790 (discussing and collecting cases that so held).

monetary remedies, renders punitive damages unnecessary.

A State's or municipality's federal funding under Section 504 may be withdrawn if there is "reasonable cause" to believe that the unit of government has violated Section 504. *See* 49 C.F.R. § 27.125 (2001). The cutoff of federal funds is a remedy more "drastic" than any award of damages. *Guardians Ass'n*, 463 U.S. at 601. It is an express sanction that makes an implied sanction unnecessary for purposes of deterrence. It is equally unnecessary for purposes of compensation, because this Court has already implied compensatory damages.

Under Section 504 and Title II, other monetary damages may be available to remedy a violation of those provisions.[3] *Doe*, 242 F.3d at 456. The availability of such monetary damages, questionable though they are against a sovereign State, draws into question the Eighth and Fourth Circuit's application of *Franklin* to a municipality. The rule in *Franklin* is designed to provide *"necessary"* remedial relief for a federal cause of action. *Bell v. Hood*, 327 U.S. 678, 684 (1946) (emphasis added) (citing *Marbury v. Madison*, 5 U.S. at 163 (" '[E]very right, when withheld, must have a remedy, and every injury its proper re-

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[3] As previously noted, *supra* at p. 1, some lower federal courts have held that Congress effectively abrogated States' sovereign immunity under Section 504 and Title II. In regards to the municipality in this case, which the Eighth Circuit held does not have Eleventh Amendment immunity, Pet. App. 8a, the Eighth Circuit erred by allowing punitive damages where compensatory damages had already "made whole" the plaintiff.

dress.' ")). Punitive damages are not "necessary" remedial relief. "[T]hey are *private fines levied by civil juries to punish reprehensible conduct* and to deter its future occurrence." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (quotation omitted) (emphasis added). They are an "extraordinary sanction," *id.*, that courts should not lightly imply to abrogate units of government's traditional immunity.

Congress's express approval of an administrative sanction that "punishes" a unit of government, coupled with the Court's implied, compensatory remedy, shows that Congress did not intend to abrogate government's common law immunity by imposing on them additional, punitive damages.

CONCLUSION

For the reasons stated, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 26 2002
CLERK

No. 01-682

IN THE

Supreme Court of the United States

KAY BARNES, in her official capacity as Member of the Board of Police Commissioners of Kansas City, Missouri, *et al.*,
Petitioners,

v.

JEFFREY GORMAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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35pp

QUESTION PRESENTED

Whether § 203 of the Americans With Disabilities Act or § 505 of the Rehabilitation Act provide a right to recover punitive damages from a local government.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

Amici fully support the important purposes of the Americans With Disabilities Act and the Rehabilitation Act and acknowledge their obligation under the statutes to provide the disabled with non-discriminatory access to government services, programs, and activities. The court of appeals' creation by implication of a right to sue for punitive damages under section 203 of the ADA and section 505 of the Rehabilitation Act is, however, insupportable. The court's error is further compounded by its failure even to consider the potential applicability of the longstanding common law immunity of local governments from punitive damages. If affirmed, this unprecedented holding—which could result in the imposition of virtually limitless financial obligations on local governments, above and beyond the compensatory damages recovered by plaintiffs—would deplete scarce resources and undermine the efforts of *amici* and their members to comply with the anti-discrimination mandate of the ADA and Rehabilitation Act.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

1. Punitive damages are imposed for purposes of punishment and not compensation. They are "assessed over and above the amount necessary to compensate the injured party." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Thus, the Court has acknowledged that the imposition of punitive damages on local governments can result in a "strain on local treasuries and therefore on services available to the public at large." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

While punitive damages are part of the common law tradition, a federal court does not have power to construe by implication a federal statute as providing this extraordinary sanction. Rather, whether punitive damages should be available for a violation of federal law is policy decision of the highest import which must be made by Congress. The numerous statutory rights for which Congress has expressly authorized awards of punitive damages demonstrate the inappropriateness of judicial implication of this sanction.

2. It is, of course, a general principle of the Anglo-American legal tradition "'that every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citations omitted). While the Court has followed this principle in numerous cases, it has been careful to fashion legal and equitable remedies that are directed at "mak[ing] good the wrong done," *Bell v. Hood*, 327 U.S. 678, 684 (1946), and not at punishing defendants in civil actions.

Contrary to the reasoning of the court of appeals, the Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), does not support judicial implication of a right to recover punitive damages. *Franklin* did not involve a claim for punitive damages. Rather, *Franklin* involved only the power of a federal court to fashion a remedy of compensatory damages where equitable remedies were clearly inadequate to

redress the injury caused by a violation of federal law. Moreover, *Franklin* is replete with suggestions that a federal court's authority to imply remedies is limited to redressing violations and does not extend to imposing punitive sanctions. *Franklin* thus does not stand for the proposition that an award of punitive damages is an appropriate remedy when Congress has been silent.

Moreover, judicial implication of a right to punitive damages violates the long-established rule of construction that a penalty must be expressly imposed by statute. The federal courts do not have power to inflict penalties where a statute does not impose them. This rule applies to both criminal and civil proceedings. As the Court has explained, "the term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1880).

3. Congress adopted the remedial scheme of Title VI of the Civil Rights Act of 1964 to enforce ADA Title II and § 504 of the Rehabilitation Act. Congress's adoption of Title VI's remedial scheme provides compelling evidence that it did not intend to authorize punitive damages awards under § 202 and § 504.

Title VI expressly provides an enforcement mechanism which authorizes a federal agency to cut off funding to a recipient if it fails to comply with the statute's anti-discrimination mandate. This sanction, however, cannot be imposed until the agency has notified the appropriate officials of the violation and "determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Judicial implication of a right to punitive damages would subvert this scheme, which is based on giving a recipient notice of, and the opportunity to voluntarily correct, a violation. Moreover, an award of punitive damages would result in the diversion of funds from compliance efforts to private plaintiffs. And

because it would expose governmental entities to substantial and unpredictable liabilities which could well exceed the level of federal funds they have received, judicial imposition of punitive damages could prompt recipients to withdraw from federal programs.

Furthermore, the Court has frequently noted that Title VI is contractual in nature. *See, e.g., Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998). It is well settled that punitive damages are not awardable for breach of contract. Thus, while recognition of a right to recover compensatory damages and obtain equitable relief is consistent with the contractual nature of Title VI and its analogs, judicial implication of a right to punitive damages would be a radical departure from settled law.

4. The court of appeals' holding is erroneous for a reason unique to governmental entities. While the court judicially implied a right to recover punitive damages because such awards "are an integral part of the common law tradition," Pet. App. 10a, the court ignored an equally important and continuing part of that tradition: that punitive damages cannot be awarded against a local government absent express statutory authorization. *See City of Newport*, 453 U.S. at 260 n.21.

While the common law acknowledges that compensation for injury is an obligation properly placed on local governments, it likewise recognizes that the traditional justifications for punitive damages—retribution and deterrence—do not apply in a suit against a local government. The retributive purpose is not served because the award punishes the taxpayers, who "took no part in the commission of the tort." *Id.* at 267. Indeed, "punitive damages imposed on a municipality are in effect a windfall to the fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the

bill." *Id.* Moreover, the deterrence purpose is not served because other mechanisms exist to punish offenders such as disciplining employees or voting officials out of office.

The Court has recognized that Congress legislates "with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotations and other citations omitted). The common law principle thus applies unless it would render the statute nugatory.

Recognition of a local government's immunity from punitive damages will not render either ADA Title II or the Rehabilitation Act nugatory. Full compensatory damages are available and provide ample deterrence of future violations. Moreover, attorney's fees are also available to the prevailing plaintiff. Punitive damages are thus not necessary to encourage the victims of disability-based discrimination to bring their complaints to court or enable them to obtain legal representation. Finally, the windfalls created by punitive damages awards against local governments could in fact be counterproductive to the Acts' affirmative purposes by decreasing the resources available to improve access to public programs and facilities. The silence of both ADA Title II and the Rehabilitation Act with respect to the local governmental immunity from punitive damages thus demonstrates that Congress "legislated with an expectation" that the immunity is retained. *United States v. Texas*, 507 U.S. at 534.

ARGUMENT

NEITHER SECTION 203 OF THE ADA NOR SECTION 505 OF THE REHABILITATION ACT PROVIDE A RIGHT TO RECOVER PUNITIVE DAMAGES FROM A LOCAL GOVERNMENT

Amici fully support the important purposes of the Americans With Disabilities Act (ADA) and the Rehabilitation Act. *Amici* further acknowledge their obligation under section 202

of the ADA, 42 U.S.C. § 12132, and section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to provide the disabled with non-discriminatory access to public services, programs and activities.

Nonetheless, the decision of the court of appeals to authorize the extraordinary sanction of punitive damages against a local government involves a policy choice of the most fundamental sort which must be made by Congress's express direction and not by the federal courts through implication. Not only does the lower court's holding violate the fundamental rule that a penalty cannot be imposed by implication, it is irreconcilable with the contractual nature of the Title VI model for remedying discrimination, which expressly provides a mechanism for enforcing its anti-discrimination mandate. Moreover, while the court below sanctioned respondent's right to recover punitive damages on the ground that they are "an integral part of the common law tradition," Pet. App. 10a, it ignored an equally important rule of that tradition: "that no punitive damages are allowed [against a local government] *unless expressly authorized by statute.*" *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981) (citations omitted) (emphasis added). The judgment of the court of appeals should therefore be reversed.

A. The Court Of Appeals Erred In Implying A Right To Recover Punitive Damages Under Section 203 and Section 505

1. Punitive damages are a "quasi-criminal" sanction which "are imposed for purposes of retribution and deterrence." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). As the Court has explained, "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport*, 453 U.S. at

266-67. Indeed, punitive damages are frequently "assess[ed] . . . in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *see also BMW Of North America, Inc., v. Gore*, 517 U.S. 559, 565 (1996) (award of $4,000 in compensatory damages and $ 4 million in punitive damages); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 446 (1993) (award of "$19,000 in actual damages and $10 million in punitive damages"); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (award of $51,146 in compensatory damages and $ 6 million in punitive damages).

"The policy of giving punitive damages has been a subject of much controversy." W. Page Keeton *et al.*, *Prosser And Keeton On Torts* § 2, at 11 (5th ed. 1984). *See also BMW v. Gore*, 517 U.S. 559. In the context of governmental liability, the Court has recognized that "[t]he impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial" and can result in a "strain on local treasuries and therefore on services available to the public at large." *City of Newport*, 453 U.S. at 270-71. *See also* Dan B. Dobbs, *Torts And Compensation: Personal Accountability And Social Responsibility For Injury* 674 (1985) ("Punitive damages constitute a windfall to the plaintiff perhaps at the expense of the public generally, who may bear the costs of such damages in insurance premiums . . . .").

2. It is true that "punitive damages are an integral part of the common law tradition" and "fall within the panoply of remedies usually available to American courts." Pet. App. 10a (citations omitted). These generalizations, however, do not establish that it is appropriate for a federal court to construe by implication a federal statute as providing this extraordinary sanction.

While "there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law

tradition, . . . federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc., v. Transport Workers Union of America*, 451 U.S. 77, 95 (1981) (declining to create right to contribution in Title VII action); *see also Texas Industries, Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) ("[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law"); *cf. United States v. Eaton*, 144 U.S. 677, 687 (1892) (federal courts lack power to create and punish "common-law offenses against the United States"). As the *Texas Industries* Court further explained: "'In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.'" 451 U.S. at 646 (quoting *Northwest Airlines*, 451 U.S. at 97).

Whether and to what extent punitive damages should be available for a violation of federal law "'is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.'" *Texas Industries*, 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). The numerous statutory rights for which Congress has expressly authorized awards of punitive damages (including the employment provisions of ADA Subchapter I, 42 U.S.C. §§ 12111-12117) demonstrate the inappropriateness of judicial implication of this sanction. *See, e.g.*, 42 U.S.C. § 1981a(b) (authorizing punitive damages for intentional discrimination

by non-governmental employers); 15 U.S.C. § 15(a) (Clayton Antitrust Act); 18 U.S.C. § 1964(c) (RICO); 31 U.S.C. § 3729(a) (False Claims Act).[2]

Moreover, Congress has frequently limited the amount of punitive damages recoverable under these statutes to treble damages (and in employment discrimination cases to various limits not exceeding $300,000).[3] Congress's practice underscores the error of the decision below, which implied a right to punitive damages, subject only to the amorphous requirement that they "not be excessive." Pet. App. 16a. As the *en banc* Sixth Circuit has explained, "[i]t would be particularly unseemly for the judicial branch to create a mechanism allowing a § 504 plaintiff . . . to receive a punitive damages windfall measured in the millions of dollars, when a plaintiff

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[2] *See also* 35 U.S.C. § 284 (treble damages for patent infringement); 12 U.S.C. § 2607(d)(2) (treble damages for violation of anti-kickback requirement in settlement of federally-related mortgages); 15 U.S.C. § 1117(b) (treble damages for intentional use of counterfeit trademarks); 15 U.S.C. § 1693f(e) (treble damages for failing to correct erroneous electronic fund transfers); 25 U.S.C. § 305e(a)(2)(A) & (b) (treble and punitive damages for misrepresentation of Indian-produced goods); 11 U.S.C. § 303(i)(2)(B) (punitive damages for bad faith initiation of involuntary bankruptcy petitions); 15 U.S.C. § 1691e(b) (punitive damages in suit by individual for denial of equal credit opportunity); 42 U.S.C. § 9607(c)(3) (treble damages in suit by United States for failure to remove or remediate hazardous substance following receipt of order); 15 U.S.C. § 6604(b) (limiting punitive damages in Y2K actions to the lesser of three times the amount of compensatory damages or $ 250,000).

[3] While a plaintiff can recover punitive damages for intentional discrimination in employment under the ADA and Rehabilitation Act, *see* 42 U.S.C. § 1981a(2), Congress capped the total amount of recoverable damages based on employer size. *See id.* § 1981a(b)(3). Most significantly, the cap also applies to compensatory damages for non-pecuniary loss (such as "mental anguish" and "loss of enjoyment of life") and future pecuniary loss. *Id.* To the extent a jury awards damages for non-pecuniary loss and future pecuniary loss, the total amount of punitive damages must be reduced. Punitive damages awards will thus frequently be substantially smaller than the cap.

suing under [the employment provision] could not receive punitive damages of more than $300,000 under the mechanism created by the branches of government to which our Constitution has entrusted the enactment of legislation." *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 792 (6th Cir. 1996).

The court of appeals declined to follow *Moreno's* holding that punitive damages are not "appropriate" remedies under *Franklin*. Pet. App. 16a n.10. While the court was "sympathetic to the Sixth Circuit's concerns," *id.* at 12a, which "are hardly misplaced," *id.* at 13a, the court of appeals ultimately rejected them. In the Eighth Circuit's view, neither Congress's failure to overturn the large body of cases rejecting punitive damages claims in § 504 and Title VI cases nor its express creation of a limited right to punitive damages for intentional discrimination in employment were controlling because "[u]nder *Franklin* we are to assume that [private cause of] action to have provided all remedies," including punitive damages. *Id.* at 15a.

While acknowledging that *Franklin* requires that implied remedies be "appropriate," Pet. App. 16a, the court narrowly read this term to require only that evidence establish that the defendant had a sufficiently culpable mental state, and that the award "not be excessive." *Id.* According to the court, the term "appropriate" was not "writ so large" as to require consideration of the "legislative and judicial backdrop" of the statute. Pet. App. 16a. In the court of appeals' view, the term "appropriate" also does not require consideration of *Franklin* or its doctrinal antecedents, the question whether longstanding maxims of construction allow judicial implication of punitive damages, the nature of the remedial scheme Congress adopted in sections 203 and 505, and whether the court's holding might lead to incongruous results. As explained below, however, neither *Franklin* nor its antecedents establish that federal courts have carte blanche to impose punitive damages in the absence of express con-

gressional authorization. And the consideration of several other factors—if even necessary given the venerable prohibition on judicial implication of punitive sanctions—further demonstrates the erroneous reasoning of the court below.

4. It is, of course, a general principle of the Anglo-American legal tradition "'that every right, when withheld, must have a remedy, and every injury its *proper* redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 109) (publication year not cited)) (emphasis added). *See also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the *necessary* relief.") (emphasis added). While the Court has followed this principle in numerous cases, it has been careful to fashion legal and equitable remedies that are directed at "mak[ing] good the wrong done," *Bell*, 327 U.S. at 684, and not at punishing defendants in civil actions. *See International Bhd. Of Elec. Workers et al., v. Foust*, 442 U.S. 42 (1979); *Board of Commissioners v. United States*, 308 U.S. 343 (1939).

Thus, in *Foust* the Court refused to imply a right to punitive damages for a union member suing a union for breach of its duty of fair representation under the Railway Labor Act. *See* 442 U.S. at 48-52. The Court recognized that in some cases "actual damages caused by a union's failure to pursue grievances may be *de minimis*." *Id.* at 48. The Court thus acknowledged that "the prospect of lucrative monetary recoveries unrelated to actual injury would be a powerful incentive to bring unfair representation actions" and that "the threat of large punitive sanctions would likely affect unions' willingness to pursue individual complaints." *Id.* The Court nonetheless declined to imply a right to punitive damages, noting that "[t]he fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of

employees' rights" and that it had previously "emphasized that relief in each case should be fashioned to make the injured employee whole." *Id.* at 48-49 (citations omitted). *Cf. Board of Commissioners v. United States*, 308 U.S. at 352 (declining to imply right to pre-judgement interest and noting that county "should not be penalized").

Nor does *Franklin* support judicial implication of a right to punitive damages. In *Franklin*, the Court rejected the argument that under Title IX (20 U.S.C. §§ 1681-1688), a high school student who was subjected to intentional sex-based discrimination was entitled only to equitable remedies. *See* 503 U.S. at 75-76. Because the equitable remedies which were suggested by the defendant (backpay and prospective relief) were "clearly inadequate," and would have left the plaintiff "remediless" under the circumstances of the case, the Court held that the student was entitled to seek compensatory damages to enforce her rights under Title IX. *Id.* at 76.

As the Sixth Circuit explained, "[t]he availability of punitive damages was not at issue in *Franklin*." *Moreno*, 99 F.3d at 789 & n.3; *see Franklin*, 911 F.2d 617, 618, 622 (11th Cir. 1990). Moreover, *Franklin* is replete with references suggesting that the authority to imply remedies is limited to redressing violations and does not include imposing punitive sanctions. *See* 503 U.S. at 66 (quoting *Bell*, 327 U.S. at 684) ("'[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy *to make good the wrong done*.'") (emphasis added); *id.* ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies *to redress injuries* actionable in federal court . . . .") (emphasis added); *id.* at 68 (discussing and quoting *J.I.Case Co. v. Borak*, 377 U.S. 426, 435 (1964)) ("The Court concluded that the federal courts 'have the power to grant all *necessary remedial relief*

for violations of " the SEC Act) (emphasis added).[4] *Franklin* thus stands for no more than an application of the "general rule . . . that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71.

As the foregoing demonstrates, neither *Franklin* nor its jurisprudential antecedents support the notion that a federal court can infer from congressional silence a right to seek punitive damages. Indeed, the court of appeals cited no case in which this Court has found an implied right to recover the extraordinary sanction of punitive damages in a federal statutory scheme.[5] This is for good reason as judicial

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[4] The *Franklin* Court further explained that in the decade prior to *Cannon v. University of Chicago*, 441 U.S. 677 (1979), "the Court had approved a damages remedy" in three cases: *J.I. Case Co.*, 377 U.S. at 433; *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *See Franklin*, 503 U.S. at 72. None of these cases, however, involved a claim for punitive damages. *See Sullivan*, 396 U.S. at 239 (Suit under 42 U.S.C. § 1982; noting that "[c]ompensatory damages for deprivation of a federal right are governed by federal standards"); *Wyandotte Transp. Co.*, 389 U.S. at 195 (suit under Rivers and Harbors Act of 1899 (33 U.S.C. § 409) by United States seeking reimbursement of costs to remove shipwreck); *J.I. Case Co.*, 377 U.S. at 435 (suit under SEC Act of 1934, 15 U.S.C. § 78n(a); "Our finding that federal courts have the power to grant all necessary remedial relief is not to be construed as any indication of what we believe to be the necessary and appropriate relief in this case.").

[5] In *Smith v. Wade*, 461 U.S. 30 (1983), the Court held that punitive damages are available in a suit against a governmental official under 42 U.S.C. § 1983. The defendant, however, "concede[d]" that punitive damages were available; the issue in the case was whether recklessness or malice was required to establish liability. 461 U.S. at 35 (quotations and citations omitted); *see id.* at 37. Moreover, section 1983 expressly provides that a person who causes a deprivation of a federal right "shall be liable to the party injured in an action at law" and the Court has frequently observed that section 1983 "create[s] 'a species of tort liability.'" 461 U.S. at 34 (quoting *Carey v. Piphus*, 435 U.S. 247, 253

implication of this sanction would usurp Congress's role and deprive civil defendants of fair notice as to their potential liability. And the Eighth Circuit's reading of *Franklin*—that a court is "to assume" the Title VI cause of action "to have provided all remedies," Pet. App. 15a—turns on their head longstanding principles of statutory construction.

This Court has frequently explained that "one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (quoting *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905)). "Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced." *Elliott v. Railroad Co.*, 99 U.S. 573, 576 (1878).

While this rule is most commonly applied in criminal prosecutions, it has long been applied in civil actions. "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1880). By definition punitive damages impose penalties. *See* discussion *supra* at 6-7. The court of appeals' holding thus rests on a "fallacy" because it "assum[es] that courts have power to inflict penalties, although the law has not imposed them." *Keppel*, 197 U.S. at 363; *cf. Bifulco v. United* States, 447 U.S. 381, 387 (1980) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an

(1978) & *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)); *see also Monroe v. Pape*, 365 U.S. 167, 187 (1961) (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

Most significantly, the remedial provisions at issue here are based on a contractual rather than a tort model. *See* discussion *infra* 16-19. *Smith* thus provides no authority for the court of appeals' holding.

individual when such an interpretation can be based on no more than a guess as to what Congress intended.") (citation and internal quotation omitted).

Reaffirmance of this longstanding rule is particularly important as applied to the schemes of the ADA and Rehabilitation Act. As a general matter, the rule should be reaffirmed because it protects the citizenry and government officials from the patent unfairness of being subjected to potentially crippling punitive liability without clear notice. Moreover, while *amici* and their members fully endorse the objectives of the ADA and Rehabilitation Act, complying with the statute's anti-discrimination mandate is highly complex requiring a detailed understanding of the statutes' application in a wide variety of settings. *See, e.g.*, Pet. App. 49a (earlier opinion of court of appeals affirming grant of qualified immunity to arresting officers).[6] Consistent with its long-established rules of construction, the Court can decide this case solely on the basis that the judgment below violates the prohibition on judicial implication of punitive sanctions.

5. The remedial schemes Congress enacted in ADA § 203 and Rehabilitation Act § 505(a)(2) provide compelling evidence that Congress did not intend to authorize punitive damages. Section 203 incorporates "[t]he remedies, procedures, and rights set forth" in section 505, 42 U.S.C.

[6] In its 1998 opinion upholding the district court's grant of qualified immunity to the arresting officers, the court of appeals explained:

> At the time of Gorman's arrest in May of 1992, Title II of the ADA had only been in effect for some four months. Despite the clear language of the statute, there was uncertainty about the extent of its coverage. There were no cases addressing its possible application to government agencies like police departments or to the transportation of arrestees. Although there were some cases applying the Rehabilitation Act to prisons, there were none dealing with facts similar to those alleged by Gorman.

Pet. App. 49a.

§ 12133, which, in turn, incorporates "[t]he remedies, procedures, and rights set forth in [T]itle VI." 29 U.S.C. § 794a; *see* Pet. App. 12a (opinion of court of appeals). The remedial provisions of sections 203 and 505(a)(2) are thus based on the Title VI model for remedying discrimination. The court erred in holding that "Congress assumed the availability of all remedies, including punitive damages, under Title VI," and that "logic dictates[] the full panoply of remedies available under Title VI, including punitive damages, must be available under sections 504 and 202." Pet. App. 11a-12a.

The court of appeals' syllogism rests on the erroneous premise that punitive damages are available under Title VI. While the court of appeals dismissed the "virtual unanimity" of the numerous pre-*Franklin* decisions, which rejected punitive damages claims under both Title VI and section 504, *see Moreno*, 99 F.3d at 790; Pet. App. 12a-13a, 16a n.10, it failed to conduct any inquiry into the nature of Title VI's remedial scheme. As explained below, punitive damages are fundamentally inconsistent with Title VI's model of remedying discrimination.

Title VI "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286 (1998). The Court has long recognized the contractual nature of Title VI. *See Lau v. Nichols*, 414 U.S. 563, 568 (1974) ("Respondent school district contractually agreed to comply with title VI of the Civil Rights Act of 1964 . . . .") (internal quotation and citation omitted); *see also Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 599 (1983) (opinion of White, J.) (Title VI is a "typical 'contractual' spending power provision"); *id.* at 630 (Marshall, J., dissenting) ("applicants for federal assistance literally sign contracts in which they agree to comply with Title VI"); *cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power

is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.").

The contractual nature of Title VI imposes several fundamental limitations on the scope of the statute's remedies that preclude the implication of punitive damages. The first derives from the structure of Title VI, which expressly provides an enforcement mechanism for its anti-discrimination mandate. *See* 42 U.S.C. § 2000d-1. This provision authorizes a federal agency to "terminat[e] . . . or refus[e] to grant or . . . continue assistance" to the offending recipient. *Id.*[7] A federal agency cannot impose this severe sanction, however, "until [it] has advised the appropriate person or persons of the failure to comply . . . and has determined that compliance cannot be secured by voluntary means." *Id.* Moreover, before cutting off or denying funding, a federal agency must report to the congressional committees "having legislative jurisdiction over the program," which exercise oversight to ensure that this sanction is warranted. *Id.*

Implication of a private right to punitive damages would subvert this scheme, which is based on giving a recipient notice of, and the opportunity voluntarily to correct, a violation.[8] *See Gebser*, 524 U.S. at 288; *Moreno*, 99 F.3d at

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[7] While section 602 authorizes an agency "to promulgate disparate-impact regulations" which are not enforceable in a private right of action, *Alexander v. Sandoval*, 532 U.S. 275, 286-93 (2001), the disparate treatment prohibition of section 601 has been promulgated in the C.F.R. along with additional regulations construing the prohibition. *See, e.g.*, 28 C.F.R. § 42.104(a) & (b)(1). The disparate treatment regulations are enforceable through both a private right of action and by the agency through the termination procedure of section 602.

[8] The Title VI scheme has been adopted in the Department of Justice's ADA Title II regulations. *See* 28 C.F.R. Pt. 35, App. A, Subpart F - Compliance Procedures, at 537 (2001). As the appendix states:

> Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that

791-92. Moreover, an award of punitive damages would result in the diversion of funds from compliance efforts to plaintiffs. Indeed, the awards could frequently exceed the potential sanction involved in a termination of federal funds. *See Gebser*, 524 U.S. at 290. Even more than the *respondeat superior* liability which the Court rejected in *Gebser*, awards of punitive damages would "divert[] . . . funding from beneficial uses." *Id.* at 289.

That Congress did not adopt a tort-type scheme to enforce ADA Title II but instead used Title VI's contract-based model of enforcement is significant for a further reason. "The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach." *Restatement (Second) of Contracts* 100 (1981) (Introductory Note). Accordingly, "punitive damages have not been awarded for breach of contract." *Id.* As McCormick explains, "[i]n actions . . . upon mere private contracts . . . even where the breach is malicious and unjustified, exemplary damages are not allowable." Charles T. McCormick, *Handbook of the Law of Damages* § 81, at 286 (1935); *see also* 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 7.2, at 385-86 (4th ed. 2000) ("[I]t is . . . well established that punitive damages cannot be recovered for a mere breach of contract. This is true no matter how reprehensible the breach was by the defendant.") (footnotes omitted).

The reason for the rule is twofold. The first is that punitive damages are "usually regarded as an anomaly," and should be

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is where a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance.

Id. at 547.

"restrict[ed]." McCormick, at 291. The second stems from the recognition "that, since the vast majority of breaches of contract are due to inability or to erroneous beliefs as to the scope of the obligation, it is of doubtful wisdom to add to the risks imposed on entering into a contract this liability to an acrimonious contest over whether a breach was malicious or fraudulent and the danger of a large and undefined recovery of punitive damages." *Id.* at 291 & n.41.

While recognition of a right to recover compensatory damages and obtain equitable relief is consistent with the "contractual nature" of Title VI and its analogs, judicial implication of a punitive damages remedy would be a radical departure from the settled understanding. It would expose recipients to substantial and unpredictable liabilities, which could frequently "exceed a recipient's level of federal funding," *Gebser*, 524 U.S. at 290, and also consume a large portion of state and local funds. If subjected to such liability, recipients will reevaluate "the benefits and burdens" of accepting federal funds and may well choose to "terminate [their] receipt of federal money [rather] than assume [this] unanticipated burden[]." *Guardians*, 463 U.S. at 596 (opinion of White, J.). Judicial imposition of the tort-type right to recover punitive damages on what is essentially a contractual scheme, would thus prompt recipients to withdraw from many federal programs and undermine important civil rights goals.[9]

6. The court of appeals' implication of a private right to recover punitive damages also renders the ADA scheme highly incongruous. Under Title III, which applies to private entities operating public accommodations, a person subject to

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[9] While Title II of the ADA, unlike the Rehabilitation Act, is not limited to those instances where a local government has accepted federal funds, the existence of such programs is ubiquitous. And Congress nonetheless expressly incorporated the Title VI remedial scheme in ADA Title II.

discrimination can be awarded money damages only if the Attorney General brings suit and requests them. *See* 42 U.S.C. § 12188(b)(1)(B) & (2)(B). Punitive damages are expressly prohibited, *see id.* § 12188(b)(4); only a civil penalty can be assessed, which is payable to the U.S. Treasury and limited to a fraction of the amount of the punitive damages awarded here. *See id.* § 12188(b)(2)(C) (penalty not to "exceed[] $ 50,000 for a first violation" and "$100,000 for any subsequent violation").

The court of appeals' holding thus leads to several incongruous results. First, non-governmental entities have limited exposure to monetary penalties. State and local governmental entities are, however, subject to potentially devastating punitive damages awards. Indeed, in this case the punitive damages award is twenty-four times greater than a private firm's exposure would be under Title III. *See* Pet. App. 4a. Second, private firms pay their penalties to the U.S. Treasury, where it is used in furtherance of the public interest. State and local entities, however, would pay punitive damages awards to private plaintiffs. Given the important purposes of the ADA and Rehabilitation Act, it would be counterproductive to create a scheme which redirects governmental resources from compliance efforts to private parties.

Finally, Congress immunized for-profit entities from punitive damages liability notwithstanding that such entities are generally liable for punitive damages awards. Under the court of appeals' view, however, Congress subjected state and local government entities to punitive damages notwithstanding that public entities have traditionally enjoyed immunity from such claims and retain the immunity even when they have been made liable for compensatory damages. The resulting scheme cannot be sustained.

B. Neither ADA Title II Nor The Rehabilitation Act Abrogate The Common Law Immunity Of Local Governments From Punitive Damages

While the court of appeals erred in implying a punitive damages remedy, the holding below is erroneous for a further reason. The claims remaining in this suit were brought against the defendant members of the police board in their official capacities and thus constitute a suit against a local governmental entity. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). Without so much as an afterthought, the court below sanctioned "the novel specter of punitive damages against municipalities," *City of Newport*, 453 U.S. at 266, ignoring the well established common law immunity of a local government from punitive damages liability absent an express statutory authorization. *See id.* at 260 n.21 (citing 18 Eugene McQuillin, *Municipal Corporations* § 53.18a (3d rev. ed. 1977)).

In *City of Newport* the Court held that 42 U.S.C. § 1983, which creates a remedy against any person who, acting under color of state law, deprives another of a federal right, did not abrogate the common law immunity of municipal governments from punitive damages. As the Court observed, while "[i]t was generally understood by 1871 [when § 1983 was enacted] that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, . . . this understanding did not extend to the award of punitive . . . damages." 453 U.S. at 259-60 (footnote omitted); *see also id.* at 260 ("[T]he courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation.").

Moreover, the immunity is as vital today as it was in 1871. As *City of Newport* explained, "[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions." *Id.* (footnote and citations omitted). Contemporary treatises

agree. As one authority observes, "[i]n the overwhelming majority of jurisdictions which have considered the question, it is now firmly established that exemplary or punitive damages are not recoverable [from municipalities] unless expressly authorized by statute . . . ." 18 Eugene McQuillin & Stephen M. Flanagan, *The Law Of Municipal Corporations* § 53.18a, at 220-21 (3d rev. ed. 1984). *See also* 1A Chester James Antieau & John Michael Antieau, *Antieau's Local Government Law* § 11.233, at 11-345 (1998) ("By the weight of present authority, punitive damages are not recoverable in tort actions against local governments, in the absence of a statute specifically authorizing the award of such damages.").

Thus, while the common law acknowledges that "[c]ompensation [i]s an obligation properly shared by the municipality itself," *City of Newport*, 453 U.S. at 263, it likewise recognizes that the traditional justifications for punitive damages—retribution and deterrence—do not apply in a suit against a local government. As McQuillin explains, the retributive purpose is not served because "'the parties who must bear the burden of the punishment are the taxpayers and citizens who constitute the very persons who as a group are to benefit from the public example which the granting of such damages is supposed to make of a wrongdoer.'" *Municipal Corporations* § 53.18a, at 221 (quoting *Fisher v. Miami*, 160 So.2d 57, 59 (Fla. Dist. Ct. App. 1964), *aff'd*, 172 So.2d 455 (Fla. 1965)). And the Court, in *City of Newport*, has similarly noted "that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party." 453 U.S. at 267.

The common law courts have also recognized that the deterrence function is not served by an award of punitive damages against a local government. "'It is assumed that public officials will do their duty, and if discipline of a wrongdoing municipal employee is indicated, appropriate

measures are available through the electorate, or by superior officials responsible to the electorate, without recourse to punitive awards through the courts.'" McQuillin, *Municipal Corporations*, § 53.18a, at 221 (quoting *Ranells v. Cleveland*, 321 N.E.2d 885, 888 (Ohio 1975)) (internal quotation and other citation omitted).

Adopting this reasoning, the Court has rejected the contention that punitive damages against governmental entities are necessary to prompt local officials to take corrective action. *City of Newport* thus observed that "'[t]he more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.'" 453 U.S. at 269 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). And the Court further explained that "[t]his assumption is no less applicable to the electorate at large. . . . [I]f additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office." *Id.*

The Court has further recognized that a punitive damages award could impose grave harm on a local government's ability to meet the needs of its citizenry. In *City of Newport*, the Court stated that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* at 267. Indeed, "[b]ecause evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award . . . . [which] is likely to be both unpredictable and, at times, substantial. . . ." *Id.* at 270-71 (footnote omitted).

In *City of Newport*, the Court noted that Congress in enacting § 1983 had not "specifically . . . provided [that] it wished to abolish the [immunity] doctrine," and that "[n]othing in the legislative debates suggests that . . . Congress intended any such abolition." *Id.* at 263-64 (internal quotations and citations omitted). Because "[n]either reason nor justice" supports punitive damages awards against local governments, *id.* at 267, the Court held that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *Id.* at 271.

The language of the remedial provisions of sections 505 (Rehabilitation Act) and 203 (ADA) likewise does not provide any express textual indication of Congress' intent to abrogate the common law immunity of local governments from punitive damages. The Court has clearly instructed that "'courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (other citation and internal quotations omitted)). Thus, "'[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'" *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (quoting *United States v. Texas*, 507 U.S. at 534). "[A] statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required[.]" *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). And the Court has further explained that "the pre-existing right [must be] so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Id.*

Judicial recognition of local governments' longstanding immunity from punitive damages will not render either the Rehabilitation Act or the ADA nugatory. The statutes'

purpose of eliminating discrimination against the disabled is fully effectuated by the remedies of injunctive relief and compensatory damages. An analysis of the justifications for punitive damages demonstrates that a plaintiff's inability to obtain such an award will not "deprive the . . . statute[s] of [their] efficacy." *Id.*

One of the traditional justifications for punitive damages was the common law's failure to provide compensation for non-economic loss. *See* 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 1.3(c), at 7-8 (4th ed. 2000). *Franklin*, however, expressly authorizes the recovery of damages for non-economic loss, *see* 503 U.S. at 76, and in this case respondent was awarded $150,000 in damages "for pain and suffering." Pet. App. 21a. The statutory schemes at issue here thus do not provide inadequate compensation to the victims of disability-based discrimination. Punitive damages awards are not necessary to provide full compensation.

The other common justification for punitive damages is that they provide "a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees[.]" *Prosser & Keeton on Torts* § 2, at 12; *see also* McCormick, *Handbook on the Law Of Damages* § 77, at 277 (describing the "substantial argument" that "the award of [punitive] damages remedies . . . one of the glaring defects in our system, which is the denial of compensation for actual expenses of litigation, such as counsel fees"). Section 505 of the ADA, however, expressly authorizes an award of attorney's fees as well as "litigation expenses, and costs." 42 U.S.C. § 12205; *see also* 29 U.S.C. § 794a(b) (authorizing attorney's fees in Rehabilitation Act litigation).

Moreover, to the extent deterrence of future violations "is a primary purpose of" either Subchapter II of the ADA or the Rehabilitation Act, *see City of Newport*, 453 U.S. at 268, subjecting local governments to punitive damages liability is

no more necessary to achieve this objective than it is under Section 1983. Compensatory awards provide ample deterrence. Indeed, the windfalls created by punitive damages awards against local governments could be counter-productive to the Acts' purposes by decreasing the resources available to reduce discriminatory barriers and improve access to public programs and facilities. As the First Circuit has explained in a related context, "[d]eterrence is a function of degree, and nothing in the Rehabilitation Act or in the case law commands that it be maximized at all costs. . . . [M]aximizing deterrence might well interfere with the measured achievement of other statutory goals." *Lussier v. Runyon*, 50 F.3d 1103, 1112 (1st Cir. 1995) (footnote omitted).

The traditional immunity of local governments from punitive damages is plainly not "so repugnant" to either the ADA or Rehabilitation Act as to "deprive [either] statute of its efficacy" or "render its provisions nugatory." *Texas & Pacific Ry.*, 204 U.S. at 437. The silence of both schemes in this regard demonstrates that Congress "legislated with an expectation" that the immunity was retained. *United States v. Texas*, 507 U.S. at 534 (internal quotation and other citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

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February 26, 2002

Supreme Court U.S.
FILED
MAR 29 2002
OFFICE OF THE CLERK

No. 01-682

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Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND AARP IN SUPPORT OF THE RESPONDENT

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---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and

Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including persons seeking to vindicate their rights under federal civil rights statutes and other legislation affording them a private right of action for statutory violations. ATLA views the judicial power of the courts of the United States to grant meaningful relief for such violations, including punitive damages where appropriate, is essential to safeguarding the rights of those for whose protection Congress enacted such legislation.

AARP is a nonprofit membership organization serving more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts. Many AARP members with disabilities rely on the ADA and the Rehabilitation Act to assure access to public programs and services in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than

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1 Pursuant to Rule 37.6, Amici discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amici Curiae, their members, or its counsel make a monetary contribution to the preparation or submission of this brief.

other populations. Punitive damages are an important tool in the effort to enforce the ADA and the Rehabilitation Act, as well as other related civil rights statutes.

SUMMARY OF THE ARGUMENT

I. ATLA and AARP are primarily concerned by the position advanced by the United States as *amicus curiae* in support of Petitioners: Unless Congress has explicitly prescribed the relief available in a private right of action, the authority of federal courts to grant relief ought to be limited awards of compensatory damages. ATLA and AARP view this as a novel and radical limitation on the authority of the courts to fashion appropriate relief for violations of legal rights. Adoption of the Solicitor General's position would limit the remedies available to the courts and would amount to a dramatic subordination of the judicial branch to the legislative branch of government.

While the court looks to legislative intent to ascertain whether a private right of action exists, the analytically distinct authority to grant a particular form of relief has historically has resided in the judicial power exercised by the courts of the United States. This Court's decision in *Franklin v. Gwinnett County Public Schools* makes clear that, once a cause of action is found to exist, federal courts have the authority to grant all appropriate remedies. The Solicitor General's effort to restrict remedies to compensatory damages conflicts with this Court's cases.

This Court's decision in *International Brotherhood of Electrical Workers v. Foust* does not establish a countervailing presumption against punitive damages

in such cases. The ruling in that case addressed a specific conflict with the statutory scheme involved.

II. Permitting courts to award punitive damages in action bought under provisions of the Rehabilitation Act and the ADA would not conflict with the purposes of those enactments. The functions of punishment and deterrence of violations of the statutes are consistent with the aims of Congress. Additionally, imposing punitive damages to remove economic incentives to violate the statutes and to offer an economic incentive for private litigants to enforce the statutes through private suits both further the aims of the statutes.

III. Permitting courts to award punitive damages would not subject defendants to unfettered or unbounded jury discretion to impose large damage awards. Punitive damages have historically been subject to close judicial control to guard against excessive awards. This Court's decisions demonstrate that jury awards for punitive damages are more tightly controlled than compensatory damage awards to protect defendants.

ARGUMENT

I. UNLESS RESTRICTED BY CONGRESS, FEDERAL COURTS POSSESS THE JUDICIAL POWER TO GRANT ANY APPROPRIATE RELIEF IN A STATUTORY CAUSE OF ACTION.

The Question Presented in this case involves not only a complex task of statutory construction, but also touches upon fundamental matters of the authority of the federal courts. The lower court held that Jeffrey Gorman could proceed under "an implied cause of action" for harm resulting from defendants' violation of

Title V, section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("section 504"), and Title II, section 202 of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("section 202"). *Gorman v. Easley*, 257 F.3d 738, 745 (8th Cir. 2001). Respondent argues persuasively that Congress expressly intended to create a cause of action, including a damages remedy, and ATLA and AARP agree.

Amici is most concerned, however, by the argument advanced by the United States as *amicus curiae* in support of Petitioners: Unless Congress has explicitly prescribed the relief available in a private right of action (which encompasses nearly every implied cause of action or express cause of action where Congress is silent as to relief), the authority of federal courts to grant relief ought to be limited to compensatory damages. Brief of the United States at 11-20.

The Solicitor General proposes a novel and radical limitation on the authority of the courts to fashion appropriate relief for violations of legal rights. Historically, the authority to grant appropriate relief has resided in the judicial power exercised by the courts of the United States. Congress can prescribe limits on the remedies available under its enactments. However, to hold that this authority exists only to the extent Congress has affirmatively bestowed it upon the courts would amount to a dramatic subordination of the judicial branch to the legislative branch of government.

A. Where the Right to a Remedy Affords a Private Cause of Action, the Court Has the Authority to Grant Relief Appropriate to Make the Remedy Meaningful.

The right to seek legal redress for violation of rights is an ancient one. Sir Edward Coke traces this fundamental principle to Chapter 29 of the Magna Carta. 1 Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *55 (London, E.&R. Brooke 1797). Lord Coke further emphasized that '[E]very Act of Parliament made against any injury, mischiefe, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved [by any violation of Act].' *Id.* at *55.

This maxim was restated by Blackstone as the "general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded," and it is an "invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *23 & *109 (1765). In Coke's view, the courts' authority to provide a legal remedy was not a matter of legislative grace, but of judicial power, curbing the authority of Parliament for the benefit of the people. *See* H. Miles Foy, III, *Some Reflections On Legislation, Adjudication, And Implied Private Actions In The State And Federal Courts,* 71 Cornell L. Rev. 501, 528-29 (1986).

Lord Coke's explication of the Magna Carta exerted a profound influence on this nation's founding generation. *See Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("The American colonists were intimately familiar with Coke"), and on the drafters of state constitutions, thirty-eight of which include explicit guarantees of the right to a remedy. *See* Justice Leeson's scholarly discussion in

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340-43 (Ore. 2001).

This Court addressed the right to a remedy in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803). Chief Justice John Marshall declared that the "very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. Justice Marshall established what would become the paradigm of this Court's analysis. Having first determined that Marbury was entitled to a legal remedy, in the form of a cause of action, he inquired next whether the form of relief prayed for was within the judicial power of the Court to grant. In that case, Justice Marshall held that the relief – a writ of mandamus – was not within the Article III powers of the Court exercising original jurisdiction (despite an Act of Congress conferring that power).

The Court applied the right to a remedy to permit a private right of action for violation of a federal statute in *Texas & Pacific Railway v. Rigsby,* 241 U.S. 33 39-40 (1916). This Court has repeatedly emphasized that question of whether a private cause of action can be maintained is "analytically distinct" from whether the court can grant a particular form of relief. *Davis v. Passman,* 442 U.S. 228, 239 (1979). This Court has never suggested that the judicial power to afford such relief is dependent upon an affirmative grant by Congress. Rather, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood,* 327 U.S. 678, 684 (1946).

The Court reaffirmed this principle in *Franklin v. Gwinnett County Public Schools*:

> As we have often stated, the question of what remedies are available under a statute that provides a private right of action is "analytically distinct" from the issue of whether such a right exists in the first place. Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence. . . . From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . .

503 U.S. 60, 66 (1992).

The Court emphasized that "this longstanding rule [is] jurisdictional" and flows from "the federal courts' power" to award appropriate relief. *Id. Franklin* forecloses the argument pressed by the Solicitor General in this case.

B. *Franklin* Confirms the Availability of Punitive Damages In Appropriate Cases for Violation of Section 202 and Section 504.

The Solicitor General attempts to reinterpret *Franklin's* clear language, arguing that by "remedies to redress injuries" the Court meant only compensatory damages, excluding forms of relief that go beyond the recompense required to make the plaintiff whole. Brief of United States at 15-16.

The Court rejected precisely that narrow definition as "novel" and "strained" in *Smith v. Wade*,

461 U.S. 30, 36 (1983). There the Court held that punitive damages are available in a private right of action under § 1983, and specifically rejected the argument that "for redress" at the end of the section meant that Congress intended to limit recovery to compensatory damages. *Id.* As Justice Stevens more recently explained:

> When one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated. Thus, in some cases a tort is redressed by an award of punitive damages; . . . History supports the proposition that punishment or deterrence can redress an injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 127 (1998) (Stevens, J., concurring).

This Court's own usage rejects the narrow reading the Solicitor General would impose on *Franklin's* language Both before and after *Franklin*, the Court has referred to punitive damages as a "remedy" and a form of "redress" in the context of a private right of action. In *Carlson v. Green*, 446 U.S. 14, 22 (1980), for example, the Court observed:

> Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens*, 403 U.S. at 397, 91 S. Ct. at 2005, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. . . [Moreover] "punitive damages may be the only significant remedy available in some § 1983 actions.

446 U.S. at 22 & n.9 (underscoring added). *See also Curtis v. Loether*, 415 U.S. 189, 196 (1974) ("the relief

sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 & 257 (1984) (punitive damages "have long been a part of traditional state tort law," providing "adequate remedies for those who are injured by exposure to hazardous materials."); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) ("With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of Title VII and ADA violations."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647-648 n.11 (1999) ("Under the Patent Remedy Act, States are subject to all the remedies available to plaintiffs in infringement actions, which include punitive damages") (underscoring added).

The Solicitor General suggests that the door remains open for his novel interpretation of *Franklin* because the plaintiff in that case did not seek punitive damages. Brief of the United States at 12. If so, the Court definitively closed that door in *Davis v. Monroe County Bd of Education*, 526 U.S. 629 (1999). The Court reaffirmed its holding in *Franklin* that money damages are available in an implied private right of action under Title IX, *Id.* at 639-640, and held that plaintiff was entitled to maintain her cause of action seeking both compensatory and punitive damages. *Id.* at 636.

The inescapable conclusion is that this Court's holding in *Franklin*, that "all appropriate remedies" are presumptively available, plainly includes the remedy of punitive damages.

On the basis of that clear language, the majority of courts following *Franklin* have ruled that punitive

damages may be awarded in a private cause of action for violation of Section 202 or Section 504 where supported by the evidence. *See Filardi v. Loyola Univ.*, 1998 WL 111683 (N.D. Ill. Mar. 12, 1998) (denying motion to strike plaintiff's claim for punitive damages under section 504); *Saylor v. Ridge*, 989 F. Supp. 680, 690-91 (E.D. Pa. 1998) (allowing a legally blind person to recover punitive damages under the Rehabilitation Act and Title II of the ADA); *Burns-Vidlak v. Chandler*, 980 F. Supp. 1144, 1152 (D. Haw. 1997) (denying partial summary judgment because punitive damages are available under section 504); *Todd v. Elkins*, 105 F.3d 663 (8th Cir.1997) (unpublished) (upholding denial of motion to dismiss a § 504 claim seeking punitive damages); *Kilroy v. Husson College*, 959 F. Supp. 22, 24 (D. Maine. 1997) (punitive damages recoverable under § 504 based on proof of malice or reckless indifference to federally protected rights); *Hernandez v. City of Hartford*, 959 F. Supp. 125, 134 (D. Conn. 1997) ("the analysis developed in *Franklin* . . . inescapably leads to the conclusion that both compensatory and punitive damages are available" under § 504); *Garrett v. Chicago School Bd. of Trustees*, 1996 WL 411319 (N.D. Ill. July 18, 1996) (pregnant student may recover compensatory and punitive damages for discrimination under § 504); *Simenson v. Hoffman*, 1995 WL 631804 (N.D. Ill. Oct. 20, 1995) (child who was refused medical treatment may recover punitive damages under § 504 if intentional discrimination is proven); *Mild v. Mehlville Public School Dist.*, 1995 WL 819138 (E.D. Mo. Sept. 18, 1995) (employee may recover punitive damages under § 504 if discriminatory treatment resulted from a handicap); *Zaffino v. Surles*, 1995 WL 146207 (S.D.N.Y. Mar. 30, 1995) (denying motion to dismiss claim for punitive damages under § 504 for intentional discrimination);

DeLeo v. City of Stamford, 919 F. Supp. 70, 75 (D. Conn. 1995) (punitive damages are "within the full panoply of remedies" under § 504); *Kedra v. Nazareth Hosp.*, 868 F. Supp. 733, 740 (E.D. Pa. 1994) (punitive damages are available under § 504 to employees claiming intentional discrimination); *Doe v. William Shapiro, Esquire, P.C.*, 852 F. Supp. 1246, 1255 (E.D. Pa. 1994) (punitive damages may be recovered under the ADA). *Pandazides v. Virginia Bd of Education*, 13 F.3d 823, 830 (1994) (prior decision that punitive damages were unavailable under § 504 "can no longer be considered good law" following *Franklin*). *Cf., Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1078 (D. Nev. 2001) (following *Franklin*, punitive damages may be recovered under Title IX). *Contra, Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 791 (6th Cir. 1996) (punitive damages unavailable under Rehabilitation Act); *Winfrey v. City of Chicago*, 957 F. Supp. 1014, 1025 (N. D. Ill. 1997) (same).[2]

ATLA submits that the lower courts, and the Eighth Circuit in this case, correctly understood and applied this Court's decision in *Franklin*.

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[2] Even prior to *Franklin*, some courts viewed punitive damages as recoverable. *See e.g. Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) ("Although punitive damages are presumably available under § 504, the Court finds that the assessment of such damages against defendant is not justified under the facts of this case"); *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) (full panoply of remedies available under § 504 but not against a State because of the Eleventh Amendment).

C. There is No Basis for a Presumption Against Punitive Damages.

The Solicitor General purports to identify a presumption contrary to *Franklin* in this Court's opinion in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). In the Solicitor General's view, *Foust* "held that a punitive damages remedy should not be inferred '[a]bsent clear congressional guidance' to the contrary." Brief of United States at 11, quoting 442 U.S. at 52. "That presumption, and not the one in *Franklin*, should govern the remedy issue in this case." *Id.*

The Solicitor General misreads *Foust*. There a railroad worker who had been discharged following an injury sued his union under the Railway Labor Act. He alleged that the union had breached its duty of fair representation by failing to properly file a grievance with the company. Plaintiff's suit was based on an implied right of action under the Act for which Congress had made no provision regarding remedies. *Id.* at 47. The Court ruled that punitive damages were not available to plaintiff. Justice Marshall, writing for the majority, gave no indication that the Court was led to this result by a general presumption against punitive damages in implied causes of action. Rather, he focused on a specific conflict between plaintiff's claim and the purposes of the Railway Labor Act. The statute encouraged – indeed depended upon – the broad discretion of union representatives to pursue some grievances, settle others, and dismiss those deemed frivolous. *Id.* at 51. Potential liability for punitive damages, the Court stated, would deter the union's exercise of discretion in handling and screening claims. The result would be to render "impracticable" the collective-bargaining system established in the very

statute that gave *Foust* his right to sue. *Id.* at 51-52. "Absent clear congressional guidance," as to how this tension should be resolved, the Court ruled that punitive damages should not be awarded. *Id.* at 52.[3]

The narrow scope of the Court's decision was underscored in a concurring opinion by Justice Blackmun, joined by three other Justices. Justice Blackmun stated that the general rule set forth in the Court's previous cases remains:

> [A] court, seeking a remedy to match the union's wrong, has at its disposal the full panoply of tools traditionally used by courts to do justice between parties. Punitive damages, being one of these tools, thus are presumptively available for use in appropriate cases, unless Congress has directed otherwise.

442 U.S. at 53 (Blackmun, J., concurring).

This case presents no such conflict. The punitive damage award rendered below was imposed to deter willful violation of the federal statutes. This is wholly consistent with the purposes of the statute and does not deter conduct that Congress intended to encourage.[4]

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[3] The Court's ruling that punitive damages are unavailable in certain defamation lawsuits rests on similar reasoning: Punitive awards may deter not only defamatory speech, but also First Amendment protected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

[4] The additional argument, lifted from *Foust*, that punitive damages might by used by juries "to punish unpopular defendants," is particularly inapt in this case. Brief of United States at 17. There is no reason to believe the recipients of federal grants are especially despised. Rather, Congress enacted the Americans

II. THE AVAILABILITY OF PUNITIVE DAMAGES IS CONSISTENT WITH THE PURPOSES OF SECTION 504 AND SECTION 202.

A. Permitting Recovery of Punitive Damages in a Private Right of Action Does Not Undermine the Role of Congress in Defining Criminal Punishment or in Setting Policy.

The Solicitor General characterizes punitive damages as "quasi-criminal," imposed solely for punishment and deterrence, which are policy matters best left to the legislature. Brief of United States at 18-19. Congress in creating a right can, of course, limit the kinds of relief that may be granted for its violation. It can thereby preclude any perceived conflict with its scheme of criminal or administrative enforcement regime. But private punitive damage remedies do not inherently conflict with public enforcement, as the Solicitor General suggests.

In fact, Congress has expressly provided for recovery of punitive damages by individuals in actions under a variety of statutes. See, e.g., 11 U.S.C. § 303(i)(2)(B) (petition for involuntary bankruptcy filed in bad faith), 11 U,S.C. § 362(h) (willful violation of automatic stay in bankruptcy); 11 U.S.C. § 363(n) (collusive bidding in sale of property); 12 U.S.C. § 3417(a)(3) (punitive damages against agency or department of the United States government for improper disclosure of financial information); 15 U.S.C. § 78u(h)(7)(A)(iii) (against Securities Exchange Comm.

With Disabilities Act expressly because "individuals with disabilities continually encounter various forms of discrimination." 42 U.S.C. § 12101(a)(5).

Involving financial records); 15 U.S.C. § 298(c) (in actions brought by jewelry trade association under statute outlawing commerce in falsely stamped gold or silver goods), 15 U.S.C. § 1116(d)(11) (wrongful seizure of goods alleged to be in violation of patent or trademark), and 15 U.S.C. § 1681n(2) (liability to consumer for obtaining consumer credit report under false pretenses); 15 U.S.C. § 1691e(b) (punitive damages in suit by individual for denial of equal credit opportunity); 26 U.S.C. § 7431(c)(1)(B)(ii) (by taxpayer against the United States for improper inspection or disclosure of tax return information).

Congress authorizes private recovery of punitive damages in these and other statutes to further its legislative policies and supplement criminal or administrative enforcement. Where Congress is silent with respect to punitive relief, the court should inquire whether such a remedy conflicts with the purpose of the enactment. However, there is no basis for a blanket presumption that such relief intrudes on the powers of Congress. Brief of the United States at 20.

B. Punitive Damages Further Statutory Goals Beyond Punishment and Deterrence.

The Solicitor General is also incorrect in asserting that permitting damages beyond recompense for injuries is simply "a windfall to a fully compensated plaintiff," Brief of United States at 16, and a cost that "does not justify the award of additional damages to serve broader societal goals of punishment and deterrence." *Id.* at 18.

Punishment and deterrence of wrongdoing are important objectives, but they are not the sole function

of punitive damages. It has long been recognized that where the motivation of the wrongdoer is monetary, punitive damages may serve to remove the financial incentive for continuing the wrongful conduct. In other situations, punitive damages serve a "quasi-compensatory" function of encouraging the victims to bring lawsuits to supplement governmental enforcement. Both these functions are applicable to section 202 and section 504 and further the aims of those statutes.

The purpose of tort liability is not only to compensate injured victims, but also to prevent injury in the first place. *See* American Bar Association, TOWARDS A JURISPRUDENCE OF INJURY 4-1 (1984); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 4 (5th ed. 1984); William M. Landes and Richard A. Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987). Punitive damages have long been recognized as an integral part of tort law precisely because compensatory damages may not be sufficient to accomplish this purpose. *See* Clarence Morris, *Punitive Damages in Tort Cases,* 46 Harv. L. Rev. 1173, 1177 (1931) (punitive damages merely increase the severity of the "admonitory" function of compensatory damages).

Courts have recognized that in some circumstances, defendants may see economic advantage in paying compensatory claims while continuing to engage in harmful conduct. The Ford Pinto case is a classic, but hardly isolated example. Ford Motor Company knew before the first Pinto was sold that the fuel system was particularly hazardous in the event of rear-end collision. An internal memo estimated that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the

hazard could be eliminated for less than $11 per car. Ford nevertheless determined that it was more profitable to pay compensatory damage claims than to make the car safer. Punitive damages were appropriate to remove the incentive to willfully expose consumers to grave risk. *See Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981); *Ford Motor Co. v. Durrill*, 714 S.W. 329 (Tex. Ct. App. 1986); Keeton, Owen, and Montgomery, CASES AND MATERIALS ON PRODUCT LIABILITY AND SAFETY 490-91 (1980) (reproducing portions of the Ford internal memo, "Fatalities Associated With Crash-Induced Fuel Leakage and Fires").

Similarly, in *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), the court upheld punitive damages for a four-year old child who was severely burned when her pajamas caught fire. The court pointed out that the manufacturer was aware of burn injuries caused by its highly flammable cotton sleepwear and that the company was facing a liability "powder keg." Nevertheless, the company calculated that it would be more costly to treat the material with a flame retardant. *Id.* at 733-34, 740.

As these decisions demonstrate, the amount of punitive damages can be calibrated in a particular case to remove the economic advantage of misconduct. This purpose is directly applicable in this case, where the recipient of federal money willfully failed to provide access for the disabled required under section 202 and section 504. Although the compensatory award in this case turned out to be substantial, the cost of providing access can also be substantial. Facing no potential liability for punitive damages, a recipient might

anticipate that it would be cheaper to pay the occasional injury claim than to bear that expense.

Such concerns are especially important under the statutory scheme in this case. As Petitioner indicates, the "draconian" remedy of terminating federal funds "is imposed only as a last resort, and only after an exacting series of due process measures have been exhausted." Brief of Petitioner at 16. Under such circumstances, a recipient might reasonably estimate that the likelihood of a cut-off for noncompliance with access provisions is remote, increasing the importance of the threat of punitive damages to furthering the statutory aims.

C. Punitive Damages Provide an Incentive for Private Citizens to Enforce the Law.

Courts have also recognized that punitive damages perform a quasi-compensatory role in appropriate circumstances by providing an incentive for private citizens to supplement governmental enforcement through private lawsuits.

Congress has expressly provided for monetary damages beyond compensatory relief in the form of treble damages for precisely this purpose. See, e.g., 15 U.S.C. § 15(a) (Clayton Antitrust Act); 18 U.S.C. § 1964(c) (RICO); 12 U.S.C. § 2607(d)(2) (treble damages for violation of anti-kickback requirement in settlement of federally-related mortgages); 15 U.S.C. § 1117(b) (treble damages for intentional use of counterfeit trademarks); 15 U.S.C. § 1693f(e) (treble damages for failing to correct erroneous electronic fund transfers); 25 U.S.C. § 305e(a)(2)(A) & (b) (treble and punitive damages for misrepresentation of Indian-produced goods); 35 U.S.C. § 284 (treble damages for patent infringement).

This Court has recognized that multiple damages are similar to punitive damages and are intended by Congress as an incentive for litigants to bring suit to enforce statutory rights, thus supplementing the resources of the Justice Department. *American Society of Mechanical Engineers,* 456 U.S. 556, 575 (1982); *Reiter v. Sonotone Corp.,* 442 U .S. 330 (1979). As the Court recently stated, the treble damage remedies available under RICO and the Clayton Act "share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." Their object is to encourage victims to act as "private attorneys general," *Rotella v. Wood,* 528 U.S. 549, 557 (2000); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 199 (1997).

This function of punitive damages also furthers the objectives section 504 and section 202. Indeed, when Congress enacted the Civil Rights Act of 1991, it added a punitive damages remedy for intentional employment discrimination. *See* 42 U.S.C. § 1981a(b). The House Report explained that such relief is "necessary to encourage citizens to act as *private attorneys general* to enforce the statute." H. Rep. No. 102-40(I), at 64 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602 (emphasis added).

Even aside from the restrictions on judicial power, when Congress is silent on the issue of forms of relief under its statutes, it makes little sense to make the availability of relief dependant upon some manner of "inferred" legislative intent. The court should inquire instead whether punitive damages are consistent with the purposes of the statute. A punitive damages

remedy that will provide a disincentive for fund recipient to willfully violate the law, and an incentive for private litigants to bring suit to enforce the statute, clearly furthers those legislative goals.

III. PUNITIVE DAMAGE AWARDS ARE CONTROLLED BY JUDICIAL REVIEW

The Solicitor General argues against exposing defendants to the "nearly unfettered discretion" of juries, handing out "unbounded punitive damage awards." Brief of United States at 25-26. The Solicitor General all but ignores a decade of decisions in which this Court addressed precisely that issue.

In *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), the Court emphasized that the common law procedure for imposing punitive damages encompasses not only the determination by the jury, but also post-verdict judicial review to assure that the amount of the award is reasonable. *Id.* at 15. The Court reviewed the "detailed substantive standards" developed by the Alabama court to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence," observing that "[t]hese standards have real effect when applied" to jury awards. *Id* 21-22

Of course, Alabama was hardly unique in subjecting punitive damage verdicts to close judicial control. This Court noted that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Honda Motor Co. v. Oberg,* 512 U.S. 415, 421 (1994). As the Alaska Supreme Court explained, "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place." *Sturm, Ruger & Co. v. Day,*

594 P.2d 38, 48 (Alaska 1979). *See also Wangen v. Ford Motor Co.*, 97 Wis. 2d 260. 298, 294 N.W.2d 437, 457 (1980) ("judicial controls . . . provide for fair administration of punitive damage awards in this state.").

Even before this Court's decisions regarding constitutional limits on punitive damages, it was generally recognized that "the court exercises much closer supervision over [punitive] awards than is the case with compensatory awards." *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). *Accord, Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934 (1990); *Deal v. Byford,* 127 Ill. 2d 192, 203, 130 Ill. Dec. 200, 205, 537 N.E.2d 267, 272 (1989). This fact is confirmed by empirical findings that punitive damages are reduced post-verdict far more often than compensatory awards. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States 47 (Sept. 1989); M. Peterson, S. Sarma and M. Shanley, Punitive Damages: Empirical Findings 30 (Rand Corp. 1987).

This Court held that judicial review of the amount of punitive damage verdicts has been so long and widely practiced at common law and so important to protecting against excessive judgments that defendants are entitled to such review as a matter of fundamental fairness under the Due Process Clause of the Fourteenth Amendment. *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994).

In addition, this Court has imposed procedural and substantive limitations on the amounts of punitive damage awards, *Haslip, supra,* and has established guidelines for evaluating their excessiveness. *BMW v.*

Gore, 517 U.S. 559 (1996). Moreover, the Court has authorized federal appellate courts to review the amount of punitive damage awards *de novo. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001).

The notion that jury discretion to award punitive damages is "unfettered" and "unbounded" is simply untrue. Such awards are clearly subject to far tighter scrutiny and control by the courts than compensatory damage awards.

When Congress enacted the Civil Rights Act of 1991, it provided a punitive damages remedy in employment discrimination suits, subject to a predetermined cap on their amount. Its decision not to impose a similar restriction in sec. 504 and 202 does not compel the conclusion that Congress disapproved of punitive damages in such cases. Rather, Congress may reasonably have intended to rely on judges to restrict jury awards on a more flexible, case-by-case basis. This Court should hold that federal courts may award punitive damages in appropriate case

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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March 29, 2002